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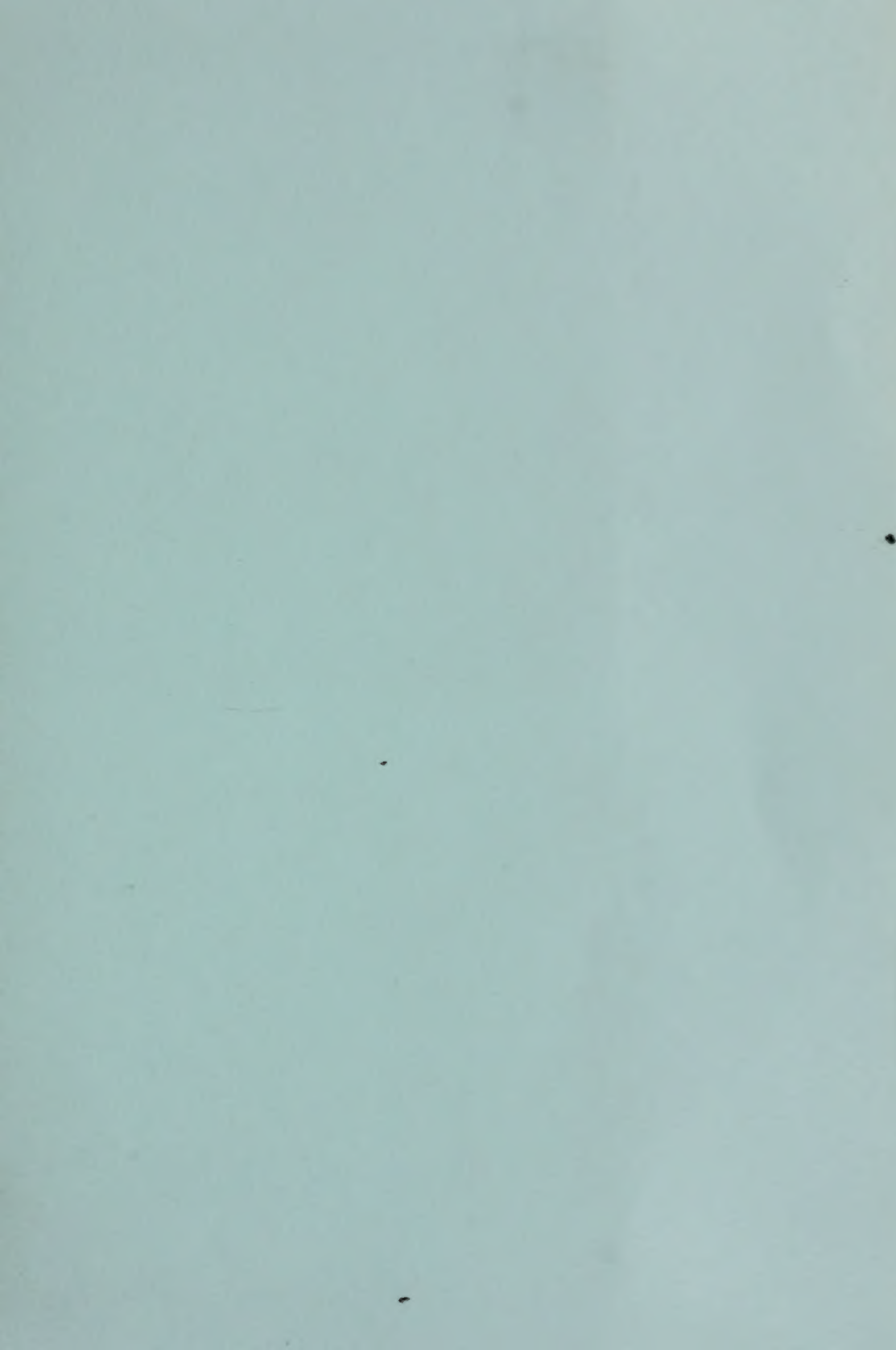
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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOE SEARS LEWIS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21234

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

WILLIAM P. COPPLE
United States Attorney
For the District of Arizona

FILED

OCT 25 1966

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOE SEARS LEWIS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21234

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

Appellee adopts the Appellant's Jurisdictional Statement of Facts.

II.

STATEMENT OF FACTS

Appellee adopts Appellant's Statement of Facts generally, but wishes to point out the following: that of the six witnesses

for Appellee who identified the Appellant, the one who was not a bank employee, Mr. Alwyn C. Kuhn, recognized the Appellant as having seen him in the bank the morning of the robbery, but Mr. Kuhn left the bank prior to the robbery and returned after the robbery. (Reporter's Transcript, page 19, lines 5-21). The robbery occurred prior to eleven o'clock in the forenoon (RT 19, L9). Government's Exhibit 14 was admitted into evidence, which was a monthly telephone bill of Appellant's sister, Jaxie Young, who testified she called from her home in Gila Bend to her parent's home in Tucson, Arizona, at 2:06 p.m. on April 29, 1965 (RT 68, L 7 to 69, L 1, Government's Exhibit 14). Mrs. Young also identified Government's Exhibit 17 as belonging to her father (RT 69, L 3-4).

(It was stipulated by the parties that Government's Exhibit 17 was the property of Appellant and was last in his possession on January 7, 1966. Government's Exhibit 17 is a forty-five caliber revolver with an over all length of approximately fourteen inches and with nickel plating which has peeled off in spots).

Government's Exhibit 17 was identified by Rose Hill as being like the gun the Appellant was carrying (RT 80, L 17-21), by Ruth Arm (RT 90, L 20-25), by Ruth Klavano (RT 99, L 22 to RT 100, L 5), and by Maurice Tansey (RT 112, L 19 to RT 113, L 8). (Neither Miss Maria Placko nor Mr. Alwyn Kuhn saw the Appellant with a gun the day of the robbery and, of course, were not shown Government's Exhibit 17).

All six of the identifying witnesses testified they identified the Appellant in a line-up consisting of a total of six people on January 11, 1966; their identification was made in writing without discussion among them (Alwyn Kuhn RT 19, L 25 to RT 20, L 8; Maria Placko, RT 72, L 11 to RT 73, L 2;

Rose Hill, RT 82, L 4-23; Ruth Arm, RT 91, L 19 to RT 92, L 8; Ruth Klavano, RT 101, L 5 to RT 102, L 11; Maurice Tansey, RT 113, L 9-24). Ruth Arm testified no other witnesses to the robbery, other than the six named Government witnesses, were present at the line-up. (RT 95, L 22 to RT 96, L 5).

The "alibi" of Appellant submitted by Appellant was circumstantial. Appellant offered the testimony of Arthur Murray, who testified that one day in April, 1965, at noontime, the Appellant came to his home and asked him to come over to the home of Appellant's parents to see some kitchen cabinets Appellant had painted (RT 166). Mr. Murray estimated the painting would take four to five hours (RT 168, L 17-20). The other witnesses put him in Gila Bend on the evening of April 28, 1965 (Carol Kelly, RT 128-129; and Jaxie Young, RT 147, L 15-21), and that he left Gila Bend for Tucson between eleven and twelve at night on April 28, 1965, (RT 147, L 23-24). The Appellant testified that it was Thursday, April 29, 1965, that he painted the cabinets (RT 182, L 15-23).

The Appellant also offered the testimony of Carol Kelly that on Wednesday, April 28, 1965, she saw the Appellant at a grocery store in Gila Bend and that he needed a haircut since she is used to very short crop hair (RT 129, L 12-19).

The testimony of Lois Spence was offered as well, that Appellant's hair was short at the end of April, 1965 (Lois Spence, RT 133, L23 to RT 134, L 6; RT 136, Lr). On cross-examination Alwyn C. Kuhn stated the bank robber, whom he had identified as the Appellant, had long side burns and needed a hair cut (RT 22, L 13-20). Maria Placko testified she saw only the back of his hair (RT 74, L 6-11). Rose Hill stated that she didn't notice his hair (RT 83, L 6-8). Ruth Arm stated

his hair was long in back, but not extremely long (RT 92, L 17-25). Ruth Klavano testified his hair was longer down his head and he needed a hair cut (RT 102, L 25 to RT 103, L 4). Maurice Tansey testified he didn't see any hair (RT 114, L 19 to RT 115, L 1).

The Appellant testified his permanent residence was St. Regis, Montana, in April, 1965 and at the time of trial he had arrived in Tucson, Arizona, in the middle of March to take care of his parents (RT 176). He spent the time finding a place to care for his parents, and thereafter was cleaning up their house, with trips back and forth to his sister's house in Gila Bend (RT 176-183). He testified he saw Lois Spence and Arthur Murray on Thursday, April 29, 1965, when he was painting the kitchen cabinets and that he was alone (RT 183). Lois Spence testified the day in April that she saw Appellant at the home of his parents he was painting and his parents were there (RT 134, L 2-19). Lois Spence stated this was the only time she saw the Appellant (RT 137, L2-4).

The Appellee offered the testimony of Eve Simpson, who testified she had taken care of Appellant's parents who first came to her home on the afternoon of April 26, 1965 (RT 38, L 11). She related that she kept records, and further, because they were new to her she was able to recall (RT 39, L 1-3). She related what occurred on April 27th and 28th (RT 39, L 15 to RT 40, L 22). On the next day, April 29, the parents asked to be driven to their home around ten in the morning and they did not find the Appellant at home (RT 41, L 18 to RT 42, L 17).

III.

OPPOSITION TO SPECIFICATIONS OF ERROR

1. There was no error in permitting questions of Appellant concerning his return to St. Regis, Montana in May of 1965, the car he was driving and of the money he had when he returned.

2. The Trial Court's clarification of Appellant's Counsel's question was not a comment and therefore no error.

3. There was no error in the Court's instructions and Appellant's counsel had the opportunity to request an instruction on alibi.

IV. SUMMARY OF ARGUMENT

1. The cross-examination of Appellant's return to St. Regis, Montana was a proper area of inquiry, in view of the direct testimony of Appellant.

2. The purpose of the question of the Trial Court was to clarify the question of Appellant's counsel, and did not constitute comment.

3. At the close of all the instructions the Trial Court gave Appellant's counsel the opportunity to request additional instructions and the Appellant did not request any.

V. ARGUMENT

1. The cross-examination of Appellant's return to St. Regis, Montana was a proper area of inquiry in view of the direct testimony of Appellant.

Appellant testified on direct as follows:
By Mr. Waterfall:

"Q. And what is your permanent residence?

"A. St. Regis, Montana.

"Q. Where was that residence in April of 1965?

"A. St. Regis, Montana.

"Q. And did you come to Tucson in April of 1965?

"A. Well, I think I arrived sometime around the middle of March actually.

"Q. And what was the purpose of that visit?

"A. I'd been requested to come down and help do something about my folks and my sister." (RT 176, L 11-20.

The cross-examination was as set out in Appellant's Brief and concerned the return trip. The entire cross-examination of Appellant is set out therein.

Appellant cites three decisions of this Circuit: *Young Ab Chor v. Dulles*, (9th Cir., 1959), 270 F. 2d 338; *United States v. Johnson*, (9th Cir., 1960), 285 F. 2d 35; and *Enriquez v. United States*, (9th Cir., 1961), 293 F. 2d 788.

The rule as stated in *Young Ab Chor v. Dulles*, *supra*, at page 342, is as follows:

"[7-11] Subject to certain exceptions, the cross-examination of a witness should be limited to matters embraced in the examination in chief. *Aplin v. United*

States, 9 Cir., 41 F 2d 495; *Chevillard v. United States*, 9 Cir., 155 F 2d 929. One exception to this rule is that cross-examination may be permitted for the purpose of testing the capacity of the witness to remember, to observe, to recount, and for the purpose of testing the sincerity and truthfulness of the witness. This may be done with respect to subjects not strictly relevant to the testimony given by the witness on direct examination. The extent of the cross-examination is a matter within the discretion of the trial court. *United States v. Bender*, 7 Cir., 218 F. 2d 869; *United States v. Manton*, 2 Cir., 107 F. 2d 834. 'The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion.' *United States v. Manton*, *supra*, at page 845. . . ."

He stated his permanent residence was St. Regis, Montana, and his residence in April of 1965 was St. Regis, Montana, but that the purpose of his trip to Tucson in the middle of March, 1965, was to help do something about his parents and his sister. The questions on cross-examination concerned his return from this trip.

The Appellant testified he did not go near the El Con Branch of The Arizona Bank on that morning, (RT 182, L 24 to RT 185, L 3), in other words, that he didn't rob the bank.

It is respectfully submitted the inquiry as to his return trip to St. Regis was within the scope on direct. Further, it was not an abuse of discretion for the Court to permit it. It tested the capacity of the witness to remember, recount and to test his truthfulness.

2. The purpose of the question by the Trial Court was to clarify the question of Appellant's counsel, and did not constitute comment.

To put the question of Appellant's counsel in context the questions and answers immediately preceding should be quoted:

"Q. Now, Mr. Tansey, would you for me, please, describe the other persons that you saw in this lineup on January 11th, 1966?

"A. No, I wouldn't be able to describe all of them. One in particular I remember was a very apparently well-dressed gentleman of medium height and build, who reminded me of someone I have seen before.

"Q. Does any—any of the other ones you recall?

"A. I cannot recall specifically.

"Q. Do you recall what clothing they were wearing?

"A. No, I can't.

"Q. Do you recall whether they had suits on or just T-shirts?

"A. One man, the one I mentioned earlier, was dressed in a suit. As far as I remember, the others were in different garbs; nothing in particular.

"Q. Now, Mr. Tansey, after you observed this lineup, did you have occasion to discuss what you saw with the other persons who were down there at the lineup?

"A. Yes. We drove down—or drove back together.

"Q. Together. And did that discussion reassure you that your identification was correct?

"A. No, I wouldn't say it reassured me, but I was certain.

"Q. Now, Mr. Tansey, did you see whether the culprit had a shirt on or not underneath the coat? Could you see a shirt?

"A. No, I did not.

"THE COURT: When are you speaking of, Mr. Waterfall?

"MR. WATERFALL: Whether the culprit had a——

"THE COURT: When? At the bank, at the lineup or——

"Q. (By Mr. Waterfall) I am talking about at the bank, what you observed at the bank.

"A. I do not recall a shirt."

(RT 117, L 5 to RT 118, L 11).

When the Government rested, the following took place at the side of the bench out of the hearing of the jury, after Appellant had moved for judgement of acquittal, and the motion was denied:

"MR. WATERFALL: Your Honor, also, I am going to move for a mistrial on the grounds that there was a reference by the Court to the person at the lineup as being the culprit, and I don't believe my own questioning led to that comment.

"MISS DIAMOS: I don't recall the——

"THE COURT: I don't recall it either, but I asked you what you meant by your prior question or 'when? At the bank or the lineup?', and when you said, 'At the bank.'

"MR. WATERFALL: As I recall, you said, 'You saw the culprit approximately—when you saw the culprit, where are you referring to? At the lineup or the bank?'

"THE COURT: *Well, if I said 'culprit', I was quoting your question. The motion is denied.*" (Emphasis supplied) (RT 124, L 18 to RT 125, L 7).

It is respectfully submitted that the characterization of this question as "comment" is without merit.

3. At the close of all the instructions the Trial Court gave Appellant's counsel the opportunity to request additional instructions and Appellant's counsel did not request any .

At the close of all the instructions by the Trial Court, the Court asked:

"Do counsel have anything further?

"MISS DIAMOS: Nothing further, Your Honor.

"MR. WATERFALL: Nothing further, Your Honor.

"THE COURT: Will you swear the Bailiff, Mr. Clerk?

"(Whereupon the Bailiff was sworn in by the Clerk)

"THE COURT: Members of the jury, the indictment in the case and the exhibits that have been received in evidence will all be collected and sent up to the jury room. . . .

"The jury is now ready to retire to deliberate, so at this time the Court excuses from further service the two alternate jurors. . . ." (RT 245, L 6 to RT 246, L1).

Appellant's counsel states at the top of page 16 of the Opening Brief:

"No instruction was offered or requested by Appellant's counsel on the subject of alibi. It was assumed that such an instruction was among the general instructions given by the Court in all such cases."

Appellant was given the opportunity to request additional instructions at the close of all the instructions; he did not take it. He cannot now complain. *Holm v. United States*, (9th Cir., 1963), 325 F. 2d 44, at page 45.

Appellant has not brought himself within the special circumstances rule of the State Court, except that it was the main or sole defense, as set out in 118 ALR 1303, at pages 1310-1311.

The Trial Court instructed as follows:

"I instruct you that the identity of the defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt not only that the crime charged was committed but also that the defendant was the one who committed it.

"You must establish beyond a reasonable doubt the accuracy of the identification of the defendant by the witnesses Kuhn, Placko, Hill, Arm, Klavano and Tansey. If facts and circumstances have been introduced into evidence which raise

a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense." (RT 242, L 1-13).

With this instruction, it is respectfully submitted, there could be no doubt, and further, the Appellant is the only one who testified he painted cabinets on April 29, 1965. The witness Arthur Murray couldn't give the day. There was no alibi established as such.

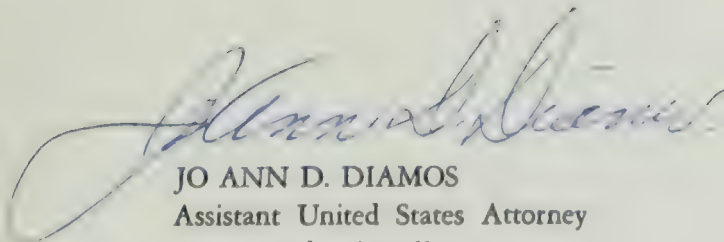
Appellant argues that the deliberation of the jury was five hours. It should be pointed out that shortly before the return of the verdict, the jury, through the foreman, asked the Court in writing if the testimony of Alwyn Kuhn was stricken. They were brought into open Court with the Appellant and both counsel present. The question was answered that the testimony of Alwyn Kuhn was not stricken. (RT 247, L 17 to RT 250, L 10).

VI. CONCLUSION

The cross-examination of Appellant was within the scope of matters raised on his direct examination. The Trial Court did not comment on the evidence in attempting to clarify the question of Appellant's counsel. The instructions of the Trial Court were sufficient with no request by Appellant when he had the opportunity to do this. It is respectfully submitted the judgement should be affirmed.

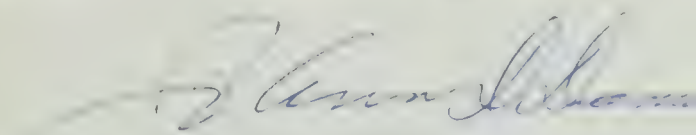
Respectfully submitted,

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Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this
24 day of October, 1966, to:

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 21235

CLAIROL INCORPORATED,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

PETITIONER'S BRIEF

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FILED

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 21235

CLAIROL INCORPORATED,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONER'S BRIEF

Statement of Issues

1. The pertinent portion of section 2(d) of the Robinson-Patman Act, 15 U.S.C. §13(d), prohibits discrimination in promotional payments between customers who compete "in the distribution" of the products to which such payments relate.¹

Petitioner sells hair care products of a chemical nature (such as dyes and bleaches) to beauty salons, which use up and destroy such materials in the course of their own

¹ Section 2(d) reads in full:

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

service activities, in the salon, of treating their patrons' hair. Respondent (Commission) has held that such beauty salons distribute petitioner's said products within the meaning of section 2(d). Petitioner (Clairol), on the other hand, maintains that they do not distribute or resell what they themselves consume in the course of performing their service function.

2. This case involved the principle of law that was decided by the Supreme Court in *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968), after filing of the petition herein. Accordingly, petitioner proposes a form of order on that issue which accords with that decision (*infra*, p. 28).

Statement of Case

The administrative proceeding below was prosecuted by the Commission, pursuant to Section 11 of the Clayton Act [38 Stat. 734, 15 U.S.C. §21], for alleged violation by petitioner of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act [49 Stat. 1526, 15 U.S.C. §13(d), as amended]. Petitioner seeks review by this Court, pursuant to section 11(c) of the Clayton Act [38 Stat. 734, 15 U.S.C. §21(c)], of the Commission's final order. Tr. 85-87.

There is no controversey between the parties as to the essential facts. The evidentiary record herein consists entirely of a stipulation between the parties. Tr. 9-43. With its attachments, it furnishes the basis of the hearing examiner's initial decision, the factual findings of which were adopted by the Commission.² Petitioner's fact references

² "Because of commendable cooperation between counsel and the hearing examiner, the record before us is confined to the facts stipulated by the parties and a number of documents attached to the stipulation. As a result, this proceeding, which might well have turned into a 'big' case, is characterized by a concise record and the resolution of Clairol's appeal does not hinge on a debate about the facts documented by the record, but, rather, the legal conclusions which may properly be drawn therefrom, namely, whether the respondent's promotional payments are within the remedial scope of the statute." Tr. 88.

will be drawn from the aforesaid three, Commission-approved documents.³

Clairol manufactures products for coloring human hair.⁴ It sells them into two channels of distribution, sometimes referred to as 1) the beauty trade, and 2) the drug trade. In the first of these, the products reach the end of their road in beauty salons where professional hairdressers consume them in the course of performing their haircoloring services. This is a true consumption by the beauty salon, and—in its hands—the final destination of the products which Clairol has manufactured and sold, for they become completely decharacterized and destroyed at that point. Tr. 28-29 [St. 18].

The patron of the beauty salon pays to it a unitary charge for the total haircoloring service; not a purchase price for the Clairol product used up in the course thereof. Tr. 22-23, 29-30 [St. 11, 19A]. The charge for the hair-

³ The following abbreviations will from time-to-time be used herein:

"St.", followed by a number, for paragraphs of the stipulation of facts.

"Att.", followed by a number, to indicate a respectively numbered attachment to the stipulation of facts. The attachments have been identified as "Exhibits" in the exhibit files furnished to the court and bear the same identification numbers as the attachments.

"I.D.", followed by a number, for paragraphs similarly numbered in the initial decision.

"C.O.", followed by a number, to indicate the particular page in the mimeo copy of the Commission's opinion.

"Tr.", will stand for references to pages of the transcript of the record on this appeal.

⁴ Those involved in this case are "Miss Clairol", "Clairol Creme Toner", "Loving Care", "Silk & Silver" and "Sparkling Color." Tr. 29-30 [St. 19A; Att. 10-38]. Their function and nature is indicated by the advertisements in evidence [Att. 10-41], and by certain descriptive literature. [Miss Clairol: Att. 101A, pp. 23-28; Clairol Creme Toner: Att. 101D, pp. 99-116; Loving Care: Att. 101G, pp. 137-138; Silk & Silver: Att. 101H, pp. 143-144; and Sparkling Color: Att. 101I, pp. 149-151].

coloring service is determined primarily by the amount of time and skill required of the hairdresser and the type, location and reputation of the particular salon; it is not, generally, keyed to the amount or value of whatever hair-coloring products are used in rendering the service. Charges for haircoloring treatments during which the salon utilizes various Clairol products range from \$3.50 to \$50, compared with retail prices for the products themselves of \$1.25 or \$1.50. Tr. 29-31 [St. 19A, 20A].

The dollar and cents fact that women are willing to pay these substantial price differentials between professional and self-application attests to the importance in their minds of the technical, creative, and personalized services of the trained hair colorist which the salons provide.

The hair colorist must possess not only a dexterity and skill in applying the necessary products and procedures, but also an artistic talent and creativeness with respect to the aesthetic, style, and fashion aspects of recommending a particular color for a particular woman, and an aptitude for combining (i.e., "blending") various shades in order to produce the one upon which the colorist and the patron have decided. Tr. 33-34 [St. 21B 1), 2)].

The colorist must have a minimum educational training, ranging from 1000 to 2500 hours in beauty schools, or two years in vocational high schools; and, in at least 34 states, the District of Columbia and Puerto Rico, must pass a state or county administered test. Tr. 34 [St. 21C]. Approximately 50 to 100 hours of such schooling is devoted to hair-coloring alone. In many cases senior students who are authorized to work in the clinics of the school complete an additional 100 hours of practical work. Tr. 34 [St. 21C 2)]. Even after receiving their licenses, many beauticians who intend to specialize in haircoloring attend further classes offered by leading manufacturers of haircoloring products, including Clairol. Tr. 35 [St. 21D 1) and 2)].

Salons, such as those located in fashionable department stores and hi-fashion type beauty salons, require their haircoloring experts to have a number of years' experience. As a rule, these specialists take with them to a new position their steady customers. Some of the very outstanding haircolorists earn as much as \$20,000 per year, exclusive of their tips.

Basic service elements involved in haircoloring include:

Item: Selecting the proper hair shade for the individual, and choosing the correct Clairol product, or blend, to achieve it. Tr. 38-39 [St. 21E 4]; Att. 101A, pp. 9-10, 24-43; Att. 101B; Att. 101C, pp. 63-64, 68-73, 214; Att. 101D, pp. 76-80, 86-87, 99-115; Att. 101F, p. 133; Att. 101G, pp. 138, 141; Att. 101H, p. 144; Att. 101I p. 150].

Item: Performing a skin patch test to determine whether the patron is allergic to the product. [Att. 101A, pp. 11-13; Att. 101C, p. 65; Att. 101D, p. 87; Att. 101G, p. 138; Att. 101H, p. 145; Att. 101I, p. 151].

Item: Performing a preliminary strand test to assure that the shade or blend of product selected will produce the expected color, and to determine the proper time for exposing the hair to the application in order to achieve the desired end result; and making any adjustments indicated if this test reveals that the original selection of blend and time is not the proper one. [Att. 101A, pp. 14-16; Att. 101C, p. 65; Att. 101D, p. 88; Att. 101F, p. 128; Att. 101G, p. 138; Att. 101H, p. 145; Att. 101I, p. 151].

Item: Applying the proper mixture in the proper manner. The procedures for doing this are too intricate to be summarized here, but are described in Att. 101A, pp. 16-17, 44-56; Att. 101C, pp. 65-74; Att. 101D, pp. 80-92, 116-125; Att. 101G, pp. 138-141; Att. 101H, pp. 145-147; Att. 101I, pp. 151-153.

Item: Problem solving. Tr. 38 [St. 21E 3]; Att. 101B; Att. 101C, p. 214; Att. 101E; Att. 101G, final page; Att. 101H, final page; Att. 101I, final two pages; Att. 101J].

Beyond such basic haircoloring procedures, the hairdresser is called upon to perform more hi-fashioned and sophisticated techniques, such as picture framing, tortoise shelling, winging, frosting, tipping, streaking and blonde-on-blond. More specific descriptions of these appear in the stipulation at paragraph 21E 2) (Tr. 36-38) and in Att. 101F.

The highly expert and personal service nature of salon hair coloring is further evidenced in the SEC listing application of Seligman & Latz, Inc., [Att. 42A-D], the major beneficiary of petitioner's advertising allowances (Tr. 14-15 [St. 5A])⁵, as well as in many of the advertisements now before this Court.⁶

⁵ "As in other service industries, personal relations with individual customers are of great importance in the Company's business. An estimated 8,500,000 customers are currently served annually, of whom about 65% are repeat customers requesting appointments with specific hair dressers or stylists. The Company devotes considerable attention to careful selection, supervision and training of its salon employees." [Att. 42B].

"Because of the importance of providing its customers with fashionable hair styling, the Company also provides its salons with consultative styling advice through its own group of eleven traveling stylists. To increase further the competence of the salons' hair stylists and hairdressers, the Company maintains advanced beautician and hair coloring schools at its New York offices." [Att. 42D].

⁶ "Let our expert color stylists create the hairdo and devise the precise shade of blonde for you." [Att. 25].

"Come in and let one of our expert colorists blend the shade of blonde that is most becoming to you." [Att. 26].

"Artistic hands added sparking strands of frost, . . ." [Att. 27].

"Our color artists formulate breathtaking blends of blonde and dramatic mutations all calculated to bring a new beautiful you into focus." [Att. 28].

In the drug trade channel the ultimate consumer is one who purchases the Clairol product at a retail establishment, such as a drug, variety or department store, for her own use at home. Tr. 25 [St. 17A 2)].

"... custom-blended in the perfect type of Clairol color for you. Complimentary Clairol color consultations with our color specialists . . ." [Att. 30].

"... blonding is our specialty! We'll choose *your* ethereal blonde shade from Clairol's shimmery galaxy of 26 Creme Toner shades . . ." [Att. 31].

"Just select your perfect color and we'll custom blend it from 13 silken-soft, shimmering shades." [Att. 32].

"... Miss Clairol custom-blended by our talented staff to produce a new hair coloring just for you! Be your own blend of blonde . . . or almost any other color in the spectrum . . ." [Att. 33].

"*Clairol makes blondes to order!* . . . aided and abetted by our Mr. Gerald. Be your own blend of blonde—or almost any other hair color in the spectrum . . . with a custom-blend shade of Miss Clairol. Mr. Gerald, master hair colorist, will lovingly create a very particular shade to suit your personality or change it!" [Att. 34].

"CLAIROL COLOR what flattery get your perfect shade in the luxury of our new salon. Want to be a dazzling Clairol Creme Toner Champagne blonde? A lustrous Miss Clairol Sable Brown? Or a just-for-you shade in between? Put yourself in the hands of our expert haircolorists—see the hair color of your dreams come true!" [Att. 35].

"Our master color-chefs will flavor your hair with light, luscious frosting. A flattering confection of fair, fair lights against your own true tones. The secret recipe? Ours alone! The exclusive ingredients? Clairol's." [Att. 36].

"Your enchanting Clairol haircolor—as blended by our experts—is as personally yours as your fingerprint!" [Att. 37].

"... —the perfect artistry of our colorist— . . . Come in and let Mr. Garrison personally select a custom coif and color just for you." [Att. 37].

"White: Special lighting effects . . . achieved by the new art of our beige-white tinting. The artistry of this new idea, introduced to the Southwest by N-M's Mr. Josh, is the way soft, gentle strokes of pale white frame your face, bring marvelous luminosity to your skin. And the way Mr. Josh does it, Clairol's Picture Frame White coloring is so subtle, so effective, so feminine that you'll radiate a feeling of being an utterly lovely new woman. That idea is the calculated result of the whole process." [Att. 38].

Wholesalers function separately within each of the two trade channels. Tr. 9 [St. 1A-1B]. Clairol sells both to wholesalers [in each channel] and to selected salon and retailer chains. Tr. 9 [St. 1A-1B].

The Commission has found petitioner guilty of violating section 2(d) of the Robinson-Patman Act ⁷ in that petitioner grants advertising allowances to some of its beauty salon customers without doing so on a proportionally equal basis for others which compete with them in performing hair-coloring services.

The question, therefore, is (a) whether such beauty salons distribute (rather than themselves consume) the products, and (b) if so, whether what they distribute is the product that petitioner originally sold to them.⁸

Summary of Argument

Petitioner will hereinafter show that beauty salons, when they do haircoloring, are performers of a personal service, not merchants distributing wares. During the course of their service they utilize petitioner's products as part of their supplies and equipment, much as a laundry uses detergents and bleaches. During the course of such use, petitioner's products are completely decharacterized and destroyed. These circumstances are at odds with the criteria for invoking section 2(d) of the Robinson-Patman Act, i.e., that the suppliers' favored and unfavored customers must be in competition with each other in 1) re-selling 2) the products they have purchased from him.

⁷ Fn. 1, page 1, *supra*.

⁸ Not only is competition in distribution by the supplier's favored and unfavored customers a prerequisite to violation of section 2(d); but also that it be competition "in the distribution of such products or commodities"—the word "such" referring back to "products or commodities manufactured, sold, or offered for sale by such [supplier]."

POINT I

Beauty salons, which utilize petitioner's products while performing the services for which their patrons pay, are consumers rather than distributors of such products.

“When a man indulges in a shave in a barber shop he is buying a service (the barber's skill and time); he is not buying shaving cream and shaving lotion. We buy shoe shines not shoe polish.” *Mueller v. United States*, 262 F. 2d 443, 447-448 (5 Cir. 1958).

The Commission purports to find inapplicable this rather self-evident analysis, stating that Mueller did “not purport to definitively spell out criteria for determining whether a transaction is to be considered a sale under the Federal Trade Commission Act or any other statute.” Tr. 99 [C.O. 10].

If anything, however, there is even less to be said for the case that a beauty salon's haircoloring service is a sale of materials, than that the barber sells shaving lotion or the bootblack his polish.

The extensiveness and expertness of the services required for haircoloring far exceeds what is involved in shaving or shining shoes. If, as *Mueller* indicates, the patron uses a barber or bootblack to spare himself the modicum of effort he would otherwise have to exercise for himself, the observation is all the more pertinent when one considers how much and the kind of work there is involved in haircoloring (*supra*, pages 4-6). Despite the Commission's rejection of *Mueller*, the point it articulates is certainly not inapplicable to haircoloring. If shaving lotion and shoe polish—some small amount of which at least is carried away in its original form by the patron—are not deemed to have been sold by the barber or bootblack, the argument that beauty salons so trade in Clairol products

is even paler. They are not carried away by the patron in even the minutest amount, for they have lost their identity in the haircolorist's hands. Tr. 28-29 [St. 18].⁹

They are not even like some dyes, which may coat or impregnate another material without losing its original chemical integrity.¹⁰ They are more akin to bleaches, which by chemical interaction and alteration affect the color of a fabric. Like Clairol products, such bleaches are decharacterized and consumed in the hands of the laundry, and are not distributed to the person whose wash has been subjected to their processing. The supermarket may distribute bleaches; the laundry does not.

No vernier is needed, for this case, to "definitively spell out criteria for determining" where on the scale *Mueller* would distinguish purchase of services from purchase of products. Here, every factor which differentiates the two types of transaction lies further toward the service side than it did in the *Mueller* statement.¹¹

⁹ The Commission's argument that *Corn Products* governs this situation will be treated with at page 20, *infra*.

¹⁰ It would be difficult to treat seriously an argument that dyers are in the business of distributing dyes.

¹¹ As pointed out by the Commission (Tr. 98 [C.O. 10]), complaint counsel had cited *Mueller* as holding that the services there under adjudication included the sale of products. The basis for that contention appears at 262 F. 2d 448, where the court relied upon the following finding of fact by the Commission:

"Paragraph two: In the course and conduct of his business, the respondent [appellant] for several years last past has been engaged in the sale and distribution of various cosmetic and other preparations for external use in the treatment of conditions of the hair and scalp, including sales of such preparations through use of them in connection with treatments administered in his various offices."

That finding, however, was by consent [see last sentence of paragraph VI of "STIPULATION", page 79 of the TRANSCRIPT OF RECORD, filed with the Court of Appeals for the Fifth Circuit on June 23, 1958] and hence does not present a litigated determination by either the Commission or the court. It has little precedential value here.

To the same effect, in a case brought under the Robinson-Patman Act itself, it was held that a construction contract, even though it expressly provided for an adjustment of price depending upon the cost of specified brick to be used, was nonetheless a purchase of service rather than of commodities, and hence not within the reach of section 2(a) of the Robinson-Patman Act.¹²

Thus, what is basically a service contract or relationship is not brought within the ambit of the Robinson-Patman Act by virtue of the fact that performance contemplates utilization, and even transfer from one party to the other, of so substantial a commodity as the brick in a structure, notwithstanding the further facts that it does not lose its original character in the course of the transaction, and that the price to be paid for the services rendered is overly keyed to the cost and nature of the specific component.

If, then, the contract in *General Shale* was for the purchase of construction services rather than of brick, the one for professional haircoloring is to an even greater extent for the service and not for items the colorist uses in rendering it. A woman need not patronize a beauty salon, paying prices which range from \$3.50 to \$50 (Tr. 29-30 [St. 19A]) if what she wants is to become a distributee of

¹² "While the contract provided that a credit would be given, or a charge made, to the [City of Louisville Municipal Housing] Commission, dependent upon whether the brick cost more or less than \$20.00 per thousand, and also provided that the general bid would be decreased by \$13,000 in case Speedbrik were selected by the Commission instead of brick and tile, nevertheless, the contract could not be said to be one for the sale of brick. * * * The agreement was not for a transfer of chattels, or the sale of personal property, but was clearly a construction contract. Because there was no sale of a commodity by the Struck Company, it could not be guilty of discrimination in the price of a commodity to the Commission." *General Shale Products Corp. v. Struck Construction Co.*, 132 F. 2d 425, 428 (6 Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

petitioner's products. She can buy them in a retail store for no more than \$1.50. Tr. 31 [St. 20A].¹³

The fact that a woman can, if she wishes, obtain from a store the same products that a beauty salon uses, and apply them to her own hair rather than go to the salon for its services,¹⁴ does not mean that the salon, as well as the store, is a distributor of the articles. One sells the product, the other a service. The very existence and nature of the choices the woman has available to her emphasize the difference between them. If she visits the retail store it is to purchase the product. If she patronizes the salon it is to avoid the work that would be involved in applying it herself, and to obtain the services of the salon in doing that for her. In one instance the woman is the vendee and consumer of the product; in the other it is the salon that uses it up in the operation of its service-type business, and which is hence its ultimate vendee and consumer.

The issue is virtually settled by the very manner in which the Commission itself poses the legal question: "The . . . questions presented to the Commission on Clairol's appeal are the following: "(1) Are beauty salons, when *in the course of rendering hair coloring services* to their patrons they *utilize* respondent's products, engaged 'in the distribution of' such articles within the meaning of Section 2(d) of the Robinson-Patman Act?" Tr. 89 [C.O. 2; emphasis ours].

¹³ The charges for the treatments incorporating haircoloring by a beauty salon, which are unitary charges for services and haircoloring products, may vary from \$3.50 to a high of \$50. The cost of respondent's products is not, as a general rule, the determinative factor in the amount charged by the salon, but such charges may be varied to cover additional product costs and services in those cases where the customer has particular hair problems or desires more elaborate services. Tr. 29-30 [St. 19A].

¹⁴ Tr. 91-92 [C.O. 4-5].

POINT II

A. Evidence internal to the Robinson-Patman Act, augmented by precedential authority, establishes that the phrase “competing in the distribution of such products or commodities” in Section 2(d) contemplates resale of such products.

B. Precedential authority establishes that beauty salons engage in the sale of services not the resale of products.

A. Resale of product by customer required.

In *Corn Products Refining Co. v. F.T.C.*,¹⁵ the Supreme Court said of section 2(e) of the Robinson-Patman Act:

“The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, *in all cases where the commodity is to be resold*, whether in its original form or in a processed product. The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased *and resold*.” p. 744 (emphasis ours)

While it was section 2(e) that was under specific consideration in *Corn Products*, it is no longer possible to doubt that minor variations in language are devoid of substantive significance.

“It seems clear, upon a study of these sections, that Sections 2(d) and 2(e) are companion sections and that distinctions between them should not be drawn merely because of the differences in terminology employed in each section.” *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 154 F.

¹⁵ 324 U.S. 726 (1945). The Commission, too, relies upon *Corn Products*. Discussion of that aspect of the case will be undertaken, *infra*, at page 20.

Supp. 471, 474 (N.D. Ill. 1957), *modified on other grounds*, 258 F. 2d 831 (7 Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

Note the discussion in Rowe, Price Discrimination Under the Robinson-Patman Act, § 13.9 "Reconciliation of disparities in Sections 2(d) and 2(e)" pp. 390-391 (1962, and Supp. 1965), which he introduces with the paragraph:

"Although the text of Sections 2(d) and 2(e) contains a spate of semantic discrepancies, courts view these provisions as reciprocal bans of co-extensive scope irrespective of minor textual variations."

Revealingly, it does not even occur to Rowe, in listing the "semantic discrepancies", to mention the variants "distribution" and "resale". Corroborative of the fact that this is a difference which has not struck anyone as being meaningful (and especially pertinent to the issue here) are cases which use "resale" whether discussing 2(d) or 2(e):

"Section 2(d) of the Robinson-Patman Act prohibits *payments* to one's customer as compensation for services or facilities furnished by the customer in connection with his resale of the merchandise unless the payments are available on proportionately equal terms to all customers competing in the resale." *Empire Rayon Yarn Co. v. American Viscose Corp.*, 238 F.Supp. 556, 560 (SDNY 1965), *revs'd on other grounds*, 354 F.2d 182 (2 Cir. 1965); see also *Exquisite Form Brassiere v. F.T.C.*, 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1544, 1545, 1548 (June 29, 1956).

The Commission, in any event, seems to have no quarrel with the proposition that sections 2(d) and 2(e) are to be read harmoniously. Tr. 101 [C.O. 13, n. 12].

Beauty salons may compete in the use or consumption of respondent's products, but not in their resale (*infra*, pages 17-18, 21-24).

Congress was cognizant enough of the differences between use, consumption, and resale to include them all expressly in section 2(a). Having unmistakably demonstrated such awareness, one can only conclude that it meant to exclude "use" and "consumption" from sections 2(d) and 2(e) when it limited them to "distribution" and "resale".

"Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read . . . There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning . . . which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary." *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 514-515 (1963).

The explicit inclusion of "use" and "consumption" in section 2(a), and their omission from sections 2(d) and 2(e) fits a consistent congressional pattern and governs the issue here under discussion. Congress undertook by the Robinson-Patman Act to deal only with injurious effects upon competition in the sale or resale of commodities. It displayed no intention to embark upon protecting competition in the performance of services.¹⁶

¹⁶ *Columbia Broadcasting System v. Amana Refrigeration, Inc.*, 295 F. 2d 375 (7 Cir. 1961); *General Shale Products v. Struck*, 132 F. 2d 425 (6 Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); *Syracuse Broadcasing Corp. v. Newhouse*, N.D.N.Y., July 30, 1962 (not reported), *aff'd on other grounds*, 319 F. 2d 683 (2 Cir. 1963). See dictum in *Scott Publishing Co. v. Columbia Basin Publishers, Inc.*, 180 F. Supp. 754, at page 770 (W.D. Wash. 1959), *aff'd on other grounds*, 293 F. 2d 15 (9 Cir. 1961).

The contrary view—confined thus far to law review theorizing—is represented by and summarized in Blake and Blum, *Network Television Rate Practices*, 74 Yale L.J. 1339, 1376-1381 (July 1965).

By section 2(a) it regulated discriminations in the sale of products, even where their purchase was for use or consumption and not for resale, because it intended to deal in that section with primary as well as secondary line injuries.¹⁷ The vendor's discrimination can adversely affect primary line competition with respect to his *sale of commodities*, even where his vendee is a user rather than a reseller thereof. Primary line injury, however, is not an object of concern in sections 2(d) and 2(e). The legislature dealt there only with competition at the customer's level. Hence, if that vendee uses or consumes the product, rather than resells it, competition in connection with the

The knowledgeable congressmen Patman and Celler, however, have opined otherwise:

Patman: "However, the word [commodity] is ordinarily used in the commercial sense to designate any movable or tangible thing that is produced or used as the subject of barter. This is the definition for the word 'commodity' used in the application of the Robinson-Patman Act." *Complete Guide to the Robinson-Patman Act* 33 (1963).

Celler: "Inasmuch, however, as that Act [the Robinson-Patman Act] is apparently not applicable to the sale of services . . ." *Antitrust Problems in the Television Broadcasting Industry*, 22 Law and Contemporary Problems 549, 569-570 (1957).

So, too, did an important report of the House of Representatives:

" . . . each network allows advertisers a variety of quantity discounts . . . Similar discounts in the sale of goods would constitute violation of the Robinson-Patman Act. * * * In its present form, however, the Robinson-Patman amendment apparently applies only to tangible commodities, and not to services . . ." Report of the Antitrust Subcommittee on the Television Broadcasting Industry of the House Committee on the Judiciary, 85th Cong., 1st Sess. 66 (1957).

Thereafter, the chairman of that committee, Rep. Celler, introduced H. R. 8277, 85th Cong., 1st Sess. (1957) to amend the statute by defining "commodities" so as to "include services, other than professional services, rendered by independent contractors." 103 Cong. Rec. 9898 (1957).

¹⁷ E.g., *Samuel H. Moss, Inc. v. F.T.C.*, 148 F. 2d 378 (2 Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), *second petition for rehearing denied*, 326 U.S. 809 (1946).

sale of a commodity at the secondary level is not present to be protected, and, in line with its over-all concept, the congress did nothing to protect the service competition of such non-vending customers.

That is precisely the situation here. Beauty salons (the secondary line of competition) use and consume petitioner's products. They sell their own services, not petitioner's commodities. Their service competition is of the nature that the congress did not attempt to reach in section 2(d). Had it wanted to do so, it could, in the pattern of section 2(a), simply and clearly enough, have written the last phrase of section 2(d) to cover competition "in the use, consumption or distribution of such products or commodities."

B. Beauty salons do not resell petitioner's products.

The contrast between two product liability cases involving Clairol products highlights the service rather than distributional nature of a beauty salon's business. *Graham v. Bottenfeld's Inc.*, 179 Kan. 68, 269 P. 2d 413 (Sup. Ct. Kan. 1954) held that the manufacturer and the wholesaler who sold the product to the salon for its use were in sufficient sales privity with the salon's customer that they could be sued by her for breach of warranty. The salon itself was not joined as a party in that action.

Where such an action was brought against a salon, however, it was dismissed on the ground that the salon, unlike the manufacturer or the wholesaler, performed services and did not sell goods.¹⁸ The court referred to analogous decisions in the interesting line of cases involving blood transfusions received by patients in the course of medical care and treatment in hospitals. E.g., *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954).¹⁹

¹⁸ *Epstein v. Giannattasio*, 25 Conn. Sup. 109, 197 A. 2d 342 (Ct. of Com. Pleas 1963).

¹⁹ More recently, *Payton v. Brooklyn Hospital*, 21 A.D. 2d 898, 252 N.Y.S. 2d 419 (2nd Dept. 1964), *aff'd*, 19 N.Y. 2d 610, 224 N.E. 2d 891 (1967).

Even more pertinent to the within proceeding was the court's citation of the authorities that "Building and construction transactions which include materials to be incorporated into the structure are not agreements of sale."²⁰ They tie in directly with the holding in *General Shale Products Corp. v. Struck Const. Co.*²¹ that such contracts are not governed by the Robinson-Patman Act.

The consistency with which beauty salons are viewed by the law as purveyors of services rather than distributors of the products with which they work is preserved in their classification as "service establishments" under the Fair Labor Standards Act of 1938. In *Fleming v. A. B. Kirschbaum Co.*²² the Court of Appeals cited with approval the suggestion in *Wood v. Central Sand & Gravel Co.*²³ that by service establishments congress meant such operations as "barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops." (124 F. 2d at pp. 572-573.)

Similarly, in *Stucker v. Roselle*²⁴ the court, applying the Fair Labor Standards Act, stated:

"... for the purposes of this case we can follow the definition given by Interpretative Bulletin #6 ... in which it is stated 'typical examples of service establishments ... within the meaning of the exemption are restaurants, hotels, laundries, garages, barber shops, beauty parlors and funeral homes.' In the foregoing examples service is given to customers as the chief business of the concern rather than as an incidental part of the business, or work or labor is performed upon the person of the customer or upon property which the customer has left for for such service to be given to it." (37 F. Supp. at p. 867.)

²⁰ 25 Conn. Sup. at p. 113, 197 A. 2d at p. 345.

²¹ *Supra*, page 11.

²² 124 F. 2d 567 (3 Cir. 1941), *aff'd sub nom.*, *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942).

²³ 33 F. Supp. 40, 47 (W.D. Tenn. 1940).

²⁴ 37 F. Supp. 864 (W.D. Ky. 1941).

POINT III

The Commission's arguments are untenable.

The Commission's decision must stand or fall upon the reasons relied upon for it by the Commission itself. As stated by the Supreme Court:

"Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administration process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action * * *.'" *Burlington Truck Lines v. United States*, supra, 371 U.S. at 168; see *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n v. Chenery Corp.*, supra, at 196." *N.L.R.B. v. Metropolitan Life Insurance Company*, 380 U.S. 438, 443-444 (1965).²⁵

A. The Commission's decision depends upon there being a resale of Clairol products by the beauty salon to its patron.

Turning analytically to the Commission's opinion, one concept emerges as the heart, the core and the predicate of its decision that Clairol's advertising allowances to

²⁵ Similarly, in *Tri-Valley Packing Assn. v. F.T.C.*, 329 F. 2d 694 (1964), this Court ruled, when Commission counsel raised a new theory to support the Commission's decision on appeal, that the Commission should "deal first with this question on the facts and law", and remanded the case for that purpose (at page 706).

beauty salons violate section 2(d) of the Robinson-Patman Act: namely, that the beauty salon *does* sell Clairol products to its patrons when it colors their hair. Thus, at page 5 of its opinion the Commission states, "Scrutiny of certain of the cooperative advertising under consideration in this proceeding makes it clear that it was designed to sell Clairol hair coloring products." Tr. 92.

Again, at the end of footnote 11 on page 13 of its opinion (Tr. 101), the Commission observes that it deems "crucial" the "evidence indicating that Clairol viewed the beauty salons as part of its chain of distribution . . .".

Most revealing, perhaps, is the Commission's total reliance upon *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726 (1945),²⁶ a case in which the supplier's product, as originally purchased by its customer was, in fact, resold by the latter in its original chemical character, albeit hidden in a larger product.²⁷

Finally, the Commission does posit its case, at pages 16-17 of its opinion (Tr. 105), in the following direct terms: "For the reasons stated above, we have found that the hair preparations in question were not sold to beauty

²⁶ C.O. 9, 12-16 (Tr. 97, 101-105).

²⁷ In *Corn Products* the product for which advertising allowances were paid was dextrose, which the favored customer incorporated into its candy bars, and resold in that form, but still *as dextrose*. The candy bars (themselves products, not services) which the favored customer sold, were advertised to be "rich in dextrose". Tr. 102 [C.O. 13-14]. Thus, the commodity which the favored customer bought from the discriminator was resold (distributed) in the true and traditional sense of the word, since it was dextrose that was purchased and dextrose which was resold. The dextrose was not "lost", as the Commission implies at page 15 of its opinion (Tr. 103-104), or destroyed in the hands of the favored customer, as are the Clairol products (*supra*, pages 9-10). The importance to the decision of the resale of *dextrose* in the course of a *commodity vending* transaction is explicit in the quotation appearing at page 13 above.

salons by Clairol merely for use or consumption; rather, they were sold for resale or distribution.”²⁸

It further emphasizes that it rests its decision in this case upon finding a true “resale” by the salons of Clairol’s products, and not upon whatever sort of a transaction it might mean by one that “may be equated with a resale”. Tr. 103 [C.O. 15, n. 13].

B. Beauty salons do not resell Clairol products to their patrons, within the usual and normal meaning of the word.

The difficulty with the Commission’s conclusion is that it is substantively defective.

The elements necessary to a sale of Clairol products by a beauty salon to its patrons are plainly incomplete.

The hearing examiner’s initial decision forthrightly restated the criteria, then sought to stretch the evidence to fit them.²⁹ The brief of Commission’s counsel, submitted to the Commission on Clairol’s appeal from the initial decision, reiterated the same contentions (at pages 14 and 15).

²⁸ We have earlier shown that “resale” and “distribution” are to be read synonymously (*supra*, pages 13-14).

²⁹ “From what we believe to be the ‘normal and customary meaning’ of the word ‘sale’, a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid.

“The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer. Although a unitary fee is paid for the application of the hair dye, and although the larger part of that fee is for the service rendered, nevertheless a part of the fee is unquestionably paid in consideration of the material or dye furnished. That part of the fee constitutes consideration for the sale of respondent’s hair dye preparation.” Tr. 73-74 [I.D. 21-22].

Clairol, however, had pointed out to the Commission, in its brief, that the key element of a sale (transfer of title to property) was lacking.³⁰

The Commission, for its part, made no attempt at a frank measurement of the beauty salon's haircoloring transaction against the "'normal and customary meaning' of the word 'sale'".³¹

Instead it built upon equivocations to which the word "sell" is susceptible. For example, its statement, referred to at page 20 above, that the cooperative advertising "was designed to sell Clairol hair coloring products", is correct, of course, if one takes the verb in the sense it is used when speaking of a person's effort to "sell himself" to others, or of a company's endeavor to "sell" a good corporate image to the public.

Page 7 of the Commission's Opinion (Tr. 94), leaves no doubt that it indulges in just such a play upon the word. There, as purported evidence that "clearly" the salon is

³⁰ "Here, fundamentally, is where the initial decision goes astray. In paragraph 61 it states 'The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and *title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer.*' The portion of this conclusion which we have italicized is substantively untenable. The salon's customer no more pays money to obtain a transfer of title to the chemicals which the hairdresser uses to change the color of her hair than she does for the soap that is used to shampoo it, the materials that are used to permanent wave it, or the spray that the operator uses to set it; or than does a man in a barber shop with respect to the shaving cream, talcum powder, witch hazel or scents the barber uses in serving him.

"'Mutual consent' there is, and 'money is paid', but for the service and end result of having one's hair colored, not as payment or consideration to induce a transfer of title to property." (Br. p. 13, n. 19).

³¹ To the contrary, it fudges with the statement "... decision cannot be made solely on the basis of the procedures followed in the salons. Tr. 92 [C.O. 5].

“to sell Clairol cooperatively”, it cites (with its own emphasis supplied) a salon’s reference to making “many new friends for both Clairol and ourselves”. Making friends may be “selling” in the loose, lay sense referred to above; but it does not qualify as the resale of a product or commodity in any “normal and customary” jurisprudential contemplation.

The Commission was impressed with the fact that Clairol “viewed the beauty salons as part of its chain of distribution”. Indeed, it viewed this as “crucial” to its decision. But this too is more of a play on words than a valid legal analysis; any rationale to which it is crucial must thereby be flawed.

Of course beauty salons are part of Clairol’s chain of distribution!

So, too, are the women who buy its products in drug stores for their own use at home. Without them no earlier link in the chain would have any purpose. But that does not establish that they resell or distribute petitioner’s products.

That any purchaser of Clairol’s products is part of Clairol’s total chain of distribution is undebatable. The pertinent question at this point, however, is whether he stands in that chain as a reseller or as a user. We submit that beauty salons are users (*supra*, Points I and IIB).

The Commission, on the other hand, lists certain facts to support its view that Clairol’s cooperative salon advertising was intended to make beauty salons vendors of Clairol products.³²

³² E.g., that the featuring and emphasis given to Clairol products in the cooperative advertising manifest an intention “to sell Clairol hair coloring products” (Tr. 92 [C.O. 5]), and “to sell Clairol to the prospective consumer” and “to enable the particular beauty salon to sell Clairol products” (Tr. 93-94 [C.O. 6]), and “to induce customers to ask for, and pay for, Clairol products in the salons” (Tr. 95 [C.O. 7]).

It can be conceded immediately that the objective of the advertising was to increase the volume of sales of Clairol's products. That, however, does not answer the question which is critical to this case: sales *to whom?*

Nothing to which the Commission points establishes anything more than that the purpose and effect of the cooperative advertising was to create a public preference for Clairol products which, in turn, would exert a marketing pressure upon beauty salons to purchase and use more of them. But it remains, nonetheless, use by the salons rather than vendition by them. Reverting to the analogy at page 10, *supra*: if a manufacturer were to advertise extensively "patronize a laundry that uses XYZ Bleach", that would hardly constitute the laundry a vendor of the bleach.

At the same time, however, the Commission cannot help slipping into the true description of the commercial purpose of Clairol's cooperative advertising program (which, incidentally, is completely harmonious with the juridical concept of the salon's relationships with its patrons as described by petitioner), for it concludes its factual resumé of this aspect of the case with the following significant summary: "The conclusion that the advertisements are designed to induce customers to ask for, and pay for, Clairol products in the salons must also be drawn from the copy requirements for Clairol advertising. For example, respondent insists that the name Clairol must appear in the headline of every ad, that it must be carried in a size and weight of type at least equal to the rest of the headline and that Clairol ads must feature *a salon service with a Clairol product* and that it must be clearly an ad which *sells the service incorporating respondent's product*, explaining what it is, and offering promise of beauty results." Tr. 95 [C.O. 7-8], emphasis supplied.

Thus, even the Commission ultimately sees that, when all is said and done, it is a *service* which the salon sells to its customers, and the objective and result of Clairol's advertising is to cause the salon in the course of rendering such service to *use* Clairol rather than competing products.

C. Congress intended to use the parallel words "distribution" and "resale" in sections 2(d) and 2(e) in their usual and ordinary sense of not including use or consumption.

The Commission's play upon the words "sell" and "chain of distribution" (*supra*, pages 22-23) is little more than a semantic doodle, and little less than a confession of substantive inadequacy.

It exposes the fact that a sale, in the ordinary sense of the word, is not to be found in the dealings between the beauty salon and its patrons. To do so requires a contortion of terminology.

Thus, we are inevitably brought to the real question, which is whether it must be held that congress intended to employ the words "resale" and "distribution" in a manner strange to the customary usages of the law.

It is fundamental in construing statutes that words are deemed to have been used in their ordinary and usual sense, unless there is strong and convincing evidence to the contrary.³³

Customarily, "resale" or "distribution" do not embrace concepts of use or consumption. Clairol's beauty salon customers, for example, cannot be both consumers and resellers of the same product at the same time. It would require attribution to congress of uncommon—if not internally incompatible—usage of "resale" and "distribution" to hold that it intended to embrace within them both destruction and transfer of the same commodity.

³³ "Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently." *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

"Reading the words to have 'their normal and customary meaning' . . ." *F.T.C. v. Sun Oil Co.*, *supra*, page 15 at 371 U.S. 514 (1963).

Evidence is not merely lacking that congress intended so to transmogrify the words. To the contrary, as pointed out at pages 15-17 above, it expressly distinguished between the functions of using, consuming and reselling in section 2(a), thus manifesting a clear intent to name and deal with them selectively and differentially; and placing them all into section 2(a) while specifying only the activity of resale where sections 2(d) and 2(e) are concerned.

D. Petitioner's authorities are in point that beauty salons' haircoloring service is not resale of the chemicals used, according to the usual and normal meaning of the word. The *Corn Products* decision is inapplicable to service situations.

Petitioner's authorities (*supra*, pages 9, 11, 17-18) illuminate the "normal and customary" concept of what does and what does not constitute reselling; and the "ordinary" understanding that must be attributed to that term in applying it to this case.

Whether or not they are "directly in point",³⁴ they do establish the common and traditional legal concepts (1) that beauty salons are engaged in a service and not a sales business, and (2) that tangible products utilized, or even transferred, during the course of performing a service function are not customarily deemed to have been the subject of a sale.

Directly in issue in this case is the legal status of a service transaction by beauty salons, during the course of which certain products are utilized and consumed by the performer of the services. Yet, the Commission rejects as not in point the only authorities which have been found to deal with service functions, and chooses, instead, to characterize as "most directly in point" a case which involves no service whatsoever, but deals solely with purchase and

³⁴ Tr. 97 [C.O. 9].

resale of products as such (*supra*, page 20). The Commission goes so far, even, as to find *General Shale* "obviously distinguishable" and as having "no bearing" here. Tr. 101 [C.O. 13, n. 11]. The grounds stated for this rejection have already been discussed: namely, that Clairol, according to the Commission, considered beauty salons a part of its chain of distribution, whereas *General Shale* involved only a single instance rather than a continuum of relationships between the contracting parties. Regardless of how many or few times the transaction might be repeated, however, *General Shale* unmistakably held that, within the context and meaning of the Robinson-Patman Act itself, the transfer of property as tangible, specific, identifiable and substantial as the brick in a construction project is, nonetheless, not to be considered a sale of such property when it takes place as a component of what is essentially a contract for the rendition of services.

Such a holding, we submit, cannot be so summarily dismissed as having "no bearing" and as being "obviously distinguishable" where, as here, the question, also under the Robinson-Patman Act, is whether "distribution" and "resale" contemplate products which are used up and destroyed during the process of rendering a purely personal service.

The adamancy of the Commission, in a case involving the legal status of products used in the course of a service operation, against authorities directly treating that very question, and its ardent embrace, in preference to them, of a single case which had nothing whatever to say about a service business, can only remind one of Mr. Justice Frankfurter's piercing observation, "In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem."³⁵

³⁵ Frankfurter, "Some Reflection on the Reading of Statutes", 47 Colum. L. Rev. 527-529 (1947).

POINT IV

The Commission's order should in any event be conformed to the Supreme Court's *Meyer* decision.

In *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968), the Supreme Court held that a retailer who purchases from a wholesaler is a "customer" of that wholesaler's vendor of the product involved within the meaning of section 2(d) of the Robinson-Patman Act.

This marked a rejection of the Commission's theory in that case—and which is also expressed in the form of order now under review—that the wholesaler in such a situation (rather than his retailer vendee) is the customer who competes with retailers that buy directly from the same supplier. Accordingly, *Meyer* requires the following changes in the Commission's order herein (Tr. 85-87):

1. Clause 1(a) should be amended to make clear that the "retailer customer" and "retailer customers" referred to therein are all intended by the Commission to be retailers who purchase directly from Clairol.

2. Clause 1(b) should be changed to read:

"Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other retailers who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use."

3. Clause 2(a) should be amended to make clear that the "customer" and "customers" referred to therein are all intended by the Commission to be beauty salons who purchase directly from Clairol.

4. Clause 2(b) should be changed to read:

“Cease and desist from making or contracting to make any such payment to or for the benefit of any such customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other beauty salons who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored beauty salon customer in the rendering of hair care services and the use of respondent’s hair care products.”

The changes referred to for clauses 2(a) and 2(b) will, of course, be moot if the position set forth by petitioner in its preceding points herein is sustained.

Conclusion

Section 2(d) of the Robinson-Patman Act does not apply to petitioner’s cooperative advertising program with beauty salons, because they do not resell petitioner’s products.

Therefore, the Commission’s cease and desist order should be modified by striking therefrom clauses 2(a) and 2(b), and by revising clauses 1(a) and 1(b) to conform with the Supreme Court’s decision in *Meyer*.

Respectfully submitted,

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**In the United States Court of Appeals
for the Ninth Circuit**

CLAIROL INCORPORATED, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

**On Petition to Review an Order of the
Federal Trade Commission**

BRIEF FOR RESPONDENT

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AUTHORITIES CITED

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<i>Mueller v. United States</i> , 262 F.2d 443 (5th Cir. 1958)	24, 26
<i>NLRB v. Hearst Publications</i> , 322 U.S. 111 (1944)	30
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**In the United States Court of Appeals
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No. 21,235

CLAIROL INCORPORATED, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

**On Petition to Review an Order of the
Federal Trade Commission**

BRIEF FOR RESPONDENT

THE ISSUES PRESENTED FOR REVIEW

Two principal issues are presented by Clairol's contentions in this Court. We are unable to accept Clairol's formulation of those issues, which we believe may accurately be stated as follows:

1. Section 2(d) of the amended Clayton Act forbids sellers to discriminate between their customers in payments for services rendered "in connection with the processing, handling, sale or offering for sale of any products or commodities" of the sellers, where the customers are competing "in the distribution of such

products or commodities." Competition between Clair-ol's beauty salon customers is conceded. The issue presented is whether there is warrant in the record and a reasonable basis in law for the Commission's holding that beauty salon purchasers of Clairol's hair care products are engaged "in the distribution of such products or commodities" within the meaning of Section 2(d), where the facts are, *inter alia*, that the payments were for the salons' advertising of the availability of Clairol products in the salons, and that in the course of rendering hair care services to customers the salon operator or employee, upon specific request from a customer, and in each separate transaction, removes the particular chosen product from its package or container, and processes, handles and applies it to the hair of the customer, who in return makes to the salon a unitary payment, part of which is for the product so applied and part for its processing, handling and application.

2. The Commission's order to cease and desist in this case was issued before, and is inappropriate in the light of, the decision in *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), in which the Court held that the term "customers" in Section 2(d) includes retailers who buy through wholesalers and compete with direct-purchasing retailers, and that any promotional payments granted the latter must be made available to the former. The issue presented concerns the form of modified order to cease and desist to be issued to conform the order to the Supreme Court's decision in *Fred Meyer, Inc.* The Commission proposes that the Court modify the order to read as follows:

IT IS ORDERED that respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers, as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of such products, unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the distribution of such products to consumers for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products, unless such payment or consideration is available on proportionally equal terms to all other beauty salon customers of respondent, including beauty salon customers who do not purchase directly from respondent, who compete with the favored beauty salon customer in the rendering of hair

care services and the use of respondent's hair care products.

STATEMENT OF THE CASE

The Nature of the Case

This case arises on a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of a proceeding in which the Commission determined that petitioner Clairol Incorporated, a wholly-owned subsidiary of Bristol-Myers Company, has been and is engaged in discriminatory practices prohibited by Section 2(d) of the amended Clayton Act, in connection with its sale and distribution, both directly and through various intermediate distributors, of hair care products to retail stores and beauty salons. The practices which the Commission found to be in use by Clairol Incorporated, and which it held to be forbidden by Section 2(d), are the making of payments to certain large retail store chains and to certain large beauty salon chains for their promotion and advertising of the availability of Clairol products in their stores and salons, and making payments to a retail store chain for demonstrators of Clairol products in its stores, while not making such payments available to smaller chain and independent retail stores and beauty salon customers competing with the favored customers in the distribution of Clairol products.¹

¹ The provisions of Section 2(d), 49 Stat. 1527; 15 U.S.C. 21(d), are as follows:

That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of

The Course of the Proceedings

The administrative proceeding began on September 15, 1964, with issuance of a complaint (Tr. 1-6)² charging Clairol Incorporated with violating Section 2(d) of the amended Clayton Act by making payments to some of its beauty salon customers for co-operative advertising of its products while not making such payments available to the competitors of such customers, and by making payments to some of its retail store customers for promotion of its products and for in-store demonstrators of their use, while not making such payments available to the competitors of such customers (Tr. 3-4).

Clairol's answer (Tr. 7-8) admitted the payments and their nonavailability to competitors, but denied they violated Section 2(d).

A stipulation (Tr. 9-40, 42) was executed by counsel for Clairol and counsel supporting the complaint, providing that it and its attachments should constitute

anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

² The reference "Tr." is to the printed Transcript of the Record, which was filed in this Court before the effective date of the new appellate rules.

the evidentiary record.³ The examiner accepted the stipulation and received it and its attachments into evidence (Tr. 41, 43).

Proposed findings and memoranda were filed by counsel for Clairol and complaint counsel,⁴ and argument was heard by the examiner.⁵ On July 16, 1965, the examiner issued his initial decision (Tr. 46-82) which contains findings as to the basic facts stipulated and as to additional facts inferred and concluded therefrom, his rulings of law that Clairol's practices violate Section 2(d), and a proposed order to cease and desist.

Clairol appealed to the Commission only from the examiner's rulings of law, and specifically informed

³ The stipulation went into great detail concerning the evidentiary facts as to which counsel could agree, but left unresolved a number of significant factual inferences and conclusions to be drawn from those facts, as to which counsel differed. The final paragraph of the stipulation provided (Tr. 40):

This stipulation, and all documents appended hereto * * * are to be considered as the record in this proceeding for the purpose of making findings of fact and conclusions of law, and as a basis for any decision or order that may be entered by the hearing examiner or the Commission. However, this stipulation and all appended documents shall not be construed as an admission by either party as to the relevancy or substantive merit of all paragraphs of said stipulation and of all appended documents with respect to the legal issues raised by the allegations of the complaint herein.

⁴ Certified record pp. 684-819, not printed.

⁵ Certified record pp. 1-54, not printed.

the Commission that it was not contesting any of the examiner's findings as to the facts."

Disposition of the Case by the Commission

On June 24, 1966, the Commission, by order (Tr. 85-87), adopted as its own the examiner's initial decision, as modified and supplemented by an accompanying opinion. In the accompanying opinion it reviewed the facts pertinent to the legal issues appealed by Clairol (Tr. 89-97), and ruled, as had the examiner, that those facts establish that Clairol's practices violate Section 2(d) (Tr. 97-109). It disagreed only with his proposed form of order, viewing it as unnecessarily broad in coverage (Tr. 109-111).⁷

The Commission found that Clairol discriminates in promotional payments between direct-purchasing chain retail store customers who compete in the distribution of Clairol products, and ruled that those discriminations are forbidden by Section 2(d). Clairol did not contest either the finding or the ruling before the Commission, and does not contest them here.

The Commission found that Clairol discriminates in promotional payments between direct-purchasing chain beauty salon customers who compete in the distribution of Clairol products, and ruled that those

⁶ Clairol's brief on appeal stated (Tr. 84):

This case poses three legal issues. There is no disagreement over facts or even, for that matter, over inferences. The controversy is solely whether [Clairol's] conduct is proscriptively defined in section 2(d).

⁷ Commissioner Elman dissented, without explanatory opinion.

discriminations are forbidden by section 2(d). Clairol contested before the examiner certain of the facts concerning the salons' processing, handling, and application of Clairol products to their customers' hair, but abandoned those issues before the Commission, and does not contend here that the relevant findings are not supported by the evidentiary record. It contended before the Commission and contends here that competition between salons is not "in the distribution of" Clairol products within the meaning of that phrase in Section 2(d) and that its discriminations between them are therefore not forbidden by the section.⁸

The Commission also found that Clairol discriminates in promotional payments between direct-purchasing retailer customers and wholesalers who resell to retailers competing directly with favored retailers, and discriminates between direct-purchasing salon customers and wholesalers who resell to salons competing directly with favored salons. Clairol did not contest those findings before the Commission and does not contest them here. The Commission ruled that discriminations between direct-purchasing customers and wholesalers selling to such customers' competitors are forbidden by Section 2(d). Clairol contested that ruling before the Commission. In this review it appears to be agreed by Clairol that the issue as to the illegality of such discriminations is settled by *Federal Trade Commission v. Fred Meyer, Inc.*, 390

⁸ That issue is the first of our stated "Issues Presented for Review," *supra*, pp. 1-2.

U.S. 341 (1968), but that because the Supreme Court held that the seller's obligation is to competitors at the same functional level rather than, as the Commission had believed, to the wholesalers, the Commission's cease-and-desist order is not appropriate and must be modified with respect to Clairol's discriminations between retail stores, and also with respect to its discriminations between salons."

Before the examiner Clairol made a number of contentions concerning findings which it desired the examiner to make as to the events which occur in transactions between beauty salons and their customers, in the course of which Clairol products are removed from their packages or containers, processed, handled, and applied to the customer's hair. The examiner made findings contrary to those contentions, Clairol explicitly acquiesced in those findings on its appeal to the Commission (*supra*, p. 7; see Tr. 84), the Commission adopted them, and Clairol does not contend as an issue here that those or any other of the Commission findings are not supported by the evidentiary record or are otherwise improper. We therefore take those findings as conclusively and exclusively establishing the facts of this case for this review.¹⁰

⁹ The necessity for modification gives rise to our second stated issue, *supra*, pp. 2-4.

¹⁰ Facts are determined by the agency's findings, which are conclusive unless set aside on review because not supported by substantial evidence. Clayton Act, Section 11(c), 73 Stat. 243; 15 U.S.C. 21(c). Stipulations as to basic facts are substantial evidence, and the weight to be given

Throughout its brief in this Court, however, Clair-ol fails to mention or to recognize the existence of certain of the findings contrary to its contentions and inconsistent with its argument, and bases its argument in significant part upon assertions of purported fact not found by the Commission and contrary to the facts found. In its "Statement of Case" (Clairol brief pp. 2-8), it mentions the existence of the Commission's findings (p. 2), but thereafter ignores them entirely, presenting as supposedly settled fact what actually is a mixture of selected excerpts from the evidentiary record and assertions of purported fact contrary to facts found by the Commission.

We do not believe that the inaccuracies in Clairol's version of the findings of fact presents any issue for decision by this Court other than as to the existence and the actual content of the findings in question. The following is, we believe, an accurate summary of the relevant facts as found by the Commission, with citations to the location of the findings in the record.

Statement of the Facts Relevant to the Issues Presented for Review

Clairol Incorporated is a Delaware corporation with office and principal place of business at 1290

the stipulated facts, and the inferences to be drawn from them, are for the agency to determine. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 739 (1945). An issue not raised before an agency cannot be presented to or entertained by a reviewing court. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955).

Avenue of the Americas, New York, New York. It is a wholly-owned subsidiary of Bristol-Myers Company, a Delaware corporation with office and principal place of business at 630 Fifth Avenue, New York, New York (Tr. 48-49; I.D. finding 8).¹¹

Clairol manufactures, sells, and distributes beauty preparations, principally hair coloring products. Its sales volume of such products is among the largest in the United States (Tr. 49; I.D. finding 8); its sales exceeded \$20,000,000 in 1964 (Tr. 49; I.D. finding 9).

Clairol sells its beauty products to a large number of customers throughout the United States, including independent beauty salons, beauty salon chains, beauty supply dealers, beauty schools, department stores, drug wholesalers, rack jobbers, drug retailers, and other retailers (Tr. 49; I.D. finding 10). It distributes its products throughout the country from warehouses in Stamford, Connecticut, and Los Angeles, California (Tr. 49-50; I.D. finding 11).

Clairol's products sold to the beauty trade are ultimately incorporated into hair care treatments rendered to customers of beauty salons in the salons (Tr. 50; I.D. finding 13).

Clairol sells almost all products to both the beauty trade and the drug store trade (Tr. 52; I.D. finding 17). Products sold to both trades are chemically identical except that shampoos sold to the beauty salons are in more concentrated form, and many

¹¹ The reference "I.D." is to the examiner's Initial Decision, all findings of which were adopted by the Commission.

products, including the largest-selling ones, are packaged in identical sizes and in some instances in identical packages (Tr. 52; I.D. finding 18).

The chemical changes which Clairol's products undergo when applied to the hair are identical whether administered at home or in a salon. Molecular alteration of the original color molecules or "intermediates," when mixed with a dilute hydrogen peroxide solution or "developer," imparts color to the hair by becoming imbedded within the hair shaft (Tr. 54; I.D. finding 23).

Among Clairol's discriminatory payments were those made in 1963 to the salon chains of the Glemby Co., Inc., and Seligman & Latz, Inc. The Glemby Company made purchases from Clairol in the amount of \$100,000, and was paid \$100,000 by Clairol for its advertising. Seligman & Latz made purchases of \$200,000 and was paid \$218,000 for its advertising (Tr. 59-60; I.D. findings 30, 31).

Salons bill their customers with unitary charges for hair care treatments without itemizing charges for separate product and labor components, but they ordinarily intend their charges to cover their costs for all such components as well as portions of operational costs and profits (Tr. 63; I.D. finding 34).

Clairol products are applied to the hair of consumers on the premises of beauty salons by salon employees who are beauticians or hair colorists. The state licensing requirements vary from 1,000 to 2,500 hours of training in a beauty school, or 2 years in a vocational high school, and some permit apprenticeship training. An eighth grade education satisfies

most states, and some do not require any formal education (Tr. 63-64; I.D. finding 35).

Only 50 to 100 hours of operators' schooling is in hair coloring, much of which is in application of coloring to live models. While beauticians who intend to specialize in hair coloring may take additional special training, there is no requirement that those using Clairol products have any such special training (Tr. 64; I.D. finding 36).

Salon customers often specify the brand of hair coloring product to be used on their hair, and many also specify the colors or shades (Tr. 64; I.D. finding 37).

The procedures and mechanics of applying Clairol products are the same whether applied by beauticians in salons or by consumers at home, and, as Clairol insists in its advertising, its products are easy and simple to use (Tr. 65; I.D. finding 39). Some Clairol products are applied in salons by beauticians who are not skilled colorists, and Clairol shampoos, conditioners, rinses, and semipermanent colorings, which were among those subject to Clairol's discriminations, require very little skill and experience (Tr. 65-66; I.D. finding 41).

The advertisements which Clairol discriminatorily paid the favored salons for publishing always featured Clairol products and urged salon customers to get Clairol product applications or treatments (Tr. 66; I.D. finding 42). The advertisements feature Clairol products as products (Tr. 66-67; I.D. findings 43-46). The primary purpose of the advertisements

is to sell consumers on the availability of Clairol products at beauty salons (Tr. 69; I.D. finding 47).

Although a unitary fee is paid the salon for application of hair dye, and although the larger part of the fee is for the application, a part is paid in consideration of the material or dye furnished, and that part constitutes consideration for the sale of the Clairol hair dye preparation (Tr. 74; I.D. finding 61). The mere fact that the products in question are "decharacterized" in the process of their application does not change the fact that a part of the fee paid is for the Clairol product (Tr. 74; I.D. finding 62).¹² Beauty salons do in fact as well as in law sell Clairol products to their customers in the course of administering hair care and coloring treatments (Tr. 75; I.D. finding 63).

The foregoing facts are summarized from the findings of the examiner adopted by the Commission. The Commission, in its opinion on Clairol's appeal of the legal issues, also summarized them, including the factual conclusions they contain (Tr. 91-95, 96). It said that Clairol's "products distributed through beauty salons are applied to the hair of consumers on the premises of the salons" (Tr. 91), that the products are in fact "distributed to consumers in the beauty salons" (Tr. 92), that Clairol's cooperative salon advertising was "designed to sell Clairol hair coloring products to the prospective consumer" (Tr. 92-93),

¹² Clairol concedes in its brief that the charges by beauty salons to their customers "are unitary charges for services and haircoloring products" (Clairol brief p. 12, n. 13).

that "the purpose of the advertising is to enable the particular beauty salon to sell Clairol products" (Tr. 94), that Clairol "expected the particular salon receiving advertising monies to sell [Clairol] hair coloring preparations to its customers in the course of hair coloring treatments" and "intended that beauty salon operators, aided by these advertisements, sell or distribute its hair coloring products to the consumers" (Tr. 95).

On the basis of its findings as to the relevant facts, the most significant of which are summarized above, the Commission ruled that the cooperative advertising for which Clairol pays the favored salons is a service or facility furnished "in connection with the processing, handling, sale or offering for sale" of Clairol's products within the meaning of Section 2(d) (Tr. 97), and that the type of distribution of Clairol products performed by the salons when they process, handle, and apply those products to their customers' hair constitutes "the distribution of such products or commodities" within the meaning of Section 2(d) (Tr. 97-106).

SUMMARY OF ARGUMENT

I. The Commission's construction of Section 2(d) of the amended Clayton Act as applicable to Clairol's promotion-payment discriminations between its beauty salon customers has ample warrant in the record and a reasonable basis in law.

Clairol's basic argument is that its discriminations between salons are exempt from the coverage of Section 2(d) because its products reach the hair of salon

customers only after they have been processed and handled by the salon operators who apply them to the customers' hair, and because chemical changes take place in the course of and as a result of that processing and handling. But it is impossible that the *presence* of processing and handling of a seller's products by customers could *exempt* its discriminations from a statute which expressly *covers* transactions involving the customers' "processing" and "handling" of those products, as Section 2(d) does.

The salons' mixing and application of Clairol products to their customers' hair, which Clairol calls a "service," are what the statute calls "handling," and that mixing and the resultant chemical changes in the products in the course of their application, which Clairol calls "decharacterization," are what the statute calls "processing." Thus the very elements of the salons' transactions which Clairol relies upon, under other names, as exempting its discriminations, are expressly mentioned in the section, under their correct names, as factors which bring discriminations within its coverage, when the products are distributed by applying them to the hair.

The Supreme Court has rejected, upon comparable facts and for reasons equally applicable here, an almost identical claim of exemption made under the companion Section 2(e) of the amended Clayton Act. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945).

Where, as in this case, the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, its construc-

tion and application of that term should be upheld on review where it has warrant in the record and a reasonable basis in the law. The Commission's decision in this case meets that test.

II. It would not be an abuse of the Commission's discretion in the choice of a remedy for Clairol's unlawful practices, for the Commission to issue a modified order to cease and desist prohibiting Clairol's discriminations between any of its competing retail store customers and any of its competing beauty salon customers, whether such customers buy directly from Clairol or through one or more levels of intermediate distributors.

In this case the Commission viewed the seller's obligations under Section 2(d) as including that of making its promotional payments available to suppliers purchasing directly from it and selling to retailers competing with the favored direct-purchasing retailers. The order it issued directs Clairol to do so. That order has been rendered inappropriate by the subsequent ruling of the Supreme Court in *Fred Meyer, Inc., supra*, holding that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" for Section 2(d) purposes, and to whom the seller must make its payments available. The Commission's order in this case must be modified to conform to that ruling.

The Commission has not been able to modify the order because it does not have jurisdiction to do so while this review is pending. It has, however, determined the form of modification it wishes to make (*supra*, pp. 3-4). That modification consists essential-

ly of deleting the two sub-paragraphs which pertain to wholesalers, and adding to each of the two remaining provisions, which pertain to retail stores and beauty salons, a phrase making clear that the Clairol customers to whom it refers include retailer customers who do not purchase directly from Clairol. Such a modified order would fit both the facts of this case and Clairol's legal obligation under Section 2(d) as construed by the Supreme Court. The order should be so modified, and affirmed and enforced as modified.

ARGUMENT

I. Beauty salon customers of Clairol are engaged "in the distribution of" Clairol products

Clairol's basic argument is that beauty salon customers are engaged solely in performing personal services, and that Clairol's discriminations between salons are exempt from the coverage of Section 2(d) because its products reach the hair of salon customers only after they have been processed and handled by the salon operators who apply them to the customers' hair, and because chemical changes take place in them and in the hair in the course of and as a result of that processing and handling.¹³ All of Clairol's other contentions are elaborations upon this argument.

The argument plainly is fallacious. It is impossible that the *presence* of processing and handling of a seller's products by customers could exempt its discriminations from coverage by a statute which in express

¹³ See Clairol's Summary of Argument, Clairol brief p. 8.

terms *covers* transactions involving the same customers' "processing" and "handling" of those products, as Section 2(d) does. That section forbids discriminatory payments to customers for services they render "in connection with the processing, handling, sale or offering for sale of any products or commodities" of the discriminating seller. The subsequent phrase, "competing in the distribution of such products or commodities," upon which Clairol relies exclusively as creating the exemption it seeks, cannot, in the face of the earlier reference to those customers' processing and handling of the products, be construed as though it read "distribution without processing or handling of such products or commodities." Yet that is the reading which Clairol's argument would require be given to the term "distribution of such products or commodities" in the section.

The salons' mixing and application of Clairol products to their customers' hair, which Clairol calls a "service," are what the statute calls "handling," and that mixing and the resultant chemical changes in the products in the course of their application, which Clairol calls "decharacterization," are what the statute calls "processing."¹⁴ Thus the very same elements of the salons' transactions which Clairol urges as exempting its discriminations are expressly mentioned in the section under their statutory names, as among the factors which bring those discriminations within its coverage.

In view of the obviously fallacious nature of Clairol's contention it is not strange that the Commission,

¹⁴ See findings 54-57, Tr. 72-73.

in rejecting it, found no prior ruling exactly in point under Section 2(d); its novelty plainly is attributable to its unmistakable lack of merit. As the Commission pointed out, the decision closest in point is *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945), brought under Section 2(e) of the Act, which forbids discriminations between "purchasers of a commodity bought for resale, with or without processing," in the furnishing to them of services or facilities "connected with the processing, handling, sale or offering for sale of such commodity."¹⁵ Sections 2(d) and 2(e) are companion provisions enacted to prevent evasion of Section 2(a)'s ban on price discriminations.¹⁶ Section 2(d) forbids discrimina-

¹⁵ Section 2(e) provides in full as follows (49 Stat. 1527; 15 U.S.C. 21(e)):

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

¹⁶ See *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349-51 (1968), and *Simplicity Pattern Co. v. Federal Trade Commission*, 360 U.S. 55 (1959). In the latter case the Court, after pointing out that the Act originally prohibited only price discriminations, said (at p. 69): "A lengthy investigation * * * disclosed that several large chain buyers were effectively avoiding § 2 by taking advantage of gaps in its coverage. * * * The Robinson-Patman amendments were enacted to eliminate

tory payments to buyers for services or facilities; Section 2(e) prohibits discriminatory furnishing of services or facilities to buyers. They are, as the Commission noted (Tr. 101, n. 12), "reciprocal bans of co-extensive scope irrespective of minor textual variations" (citing Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962) p. 390), and minor discrepancies in the terms of Sections 2(d) and 2(e) have been "ironed out by the courts in order to resolve [them] into a harmonious whole" (citing the Report of the Attorney General's National Committee to Study the Antitrust Law (1955) p. 189). A decision under either section of an issue common to both is therefore also decisive as to that issue under the other section.

Corn Products is such a decision. The contention rejected there was in all factual and legal essentials the same as *Clairol's* here, as the language of the Court shows most succinctly (324 U.S. at 744):

these inequities." See also *P. Lorillard Co. v. Federal Trade Commission*, 267 F.2d 439, 443 (3d Cir. 1959), *cert. denied*, 361 U.S. 923: "The purpose of [Section 2(d)] was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods." In *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960), the Court said: "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." See also *R. H. Macy & Co. v. Federal Trade Commission*, 326 F.2d 445, 448 (2d Cir. 1964).

It is said also that the Curtiss Company was not a purchaser of a commodity "bought for resale, with or without processing" within the meaning of § 2(e), since the Curtiss Company buys dextrose from petitioners, but uses it with other ingredients to produce candy, an entirely new commodity, which it sells. While the Act does not define the term "processing," the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced into a different state of thing. * * * In view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale would seem to be immaterial. The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product.

In view of Clairol's contention that the processing of Clairol hair coloring products results in what it calls their "decharacterization," the precise wording of the final sentence of the Court's rejection of the same argument in *Corn Products* (loc. cit.) is particularly conclusive:

The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold.

In this review proceeding Clairol attempts to escape that ruling and the principles upon which it was

based, by asserting that in *Corn Products* it was a fact that the dextrose reached the purchasers' customers chemically unchanged, as an ingredient of the candy, and that the Supreme Court's ruling turned upon that supposed fact, while in this case Clairol's products do not reach the salons' customers at all, but are "destroyed in the hands of" the salon.¹⁷

Each of these assertions is erroneous. Nothing in the Supreme Court's statement of the facts or the law in *Corn Products* suggests either that it believed the dextrose was an unaltered ingredient of the candy or that lack of alteration was a factor in its decision. Instead, it clearly implied that it believed there may have been an "alteration in the character of the commodity," and it held that any such alteration was irrelevant (324 U.S. at 744). In this case it is not a fact that Clairol products are "destroyed" in the hands of the salons and do not reach their customers; the contrary is the fact. They are processed, handled, and applied to the hair of the salon customers and perform their functions, after which they or their residues are removed. The salon customers, not the salons, seek and receive their application and their effect, and are the consumers. Thus the only difference between the actual operative facts essential to the decision in *Corn Products* and those in this case are that the processing in the former included combination with other materials while the processing in this case does not, and that there was no "handling" service in

¹⁷ See Clairol's brief, p. 20, n. 27.

Corn Products, while in this case there is. Those differences are plainly irrelevant.

Despite the irrelevance, however, Clairol argues that the presence of the handling service in the salon transactions in this case so outweighs all other factors as to convert the transactions from "distributions" of products to sales of services exclusively, rather than sales of both products and services.¹⁸ It attempts to support that contention by citing decisions most of which involve other statutes, other practices, other Congressional purposes and other attendant circumstances. The principal decisions it relies upon are *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425, 428 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943), and *Mueller v. United States*, 262 F.2d 443, 447-48 (5th Cir. 1958).

Neither decision really supports Clairol's argument or militates against the Commission's ruling. Clairol's discriminations in this case are in connection with sales *to* the putative "service" firms, not in sales *by* them, as in *General Shale* (see 132 F.2d at 428). That difference is crucial; no one has contended that discriminations *by* the salons in this case among their customers, if there are any such discriminations, would violate Section 2(d), yet that is all that the ap-

¹⁸ Clairol brief, pp. 9-12. As previously noted (*supra* p. 14, n. 12), however, Clairol concedes in its brief (p. 12, n. 13) that the "charges for the treatments incorporating haircoloring by a beauty salon * * * are unitary charges for services and haircoloring products * * *" (emphasis supplied).

plication of the ruling in *General Shale* could exempt from coverage by the section. Our reliance upon that distinction is not a quibble; it was the difference which led to a result opposite to that reached in *General Shale* in *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959). In that case sales of construction materials to building contractors were held within the coverage of Section 2(a). The same difference also led to opposite results in *United States v. Detroit Sheet Metal and Roofing Contractors Ass'n*, 116 F. Supp. 81, 87 (E. D. Mich. 1953), and *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 474-75 (1952). Those two cases involved "applicators" of built-up roofing, which is made on-site of asphalt felt and hot tar. In *Detroit Sheet Metal* discriminations in sales *by* applicators were said not to be in violation of Section 2(a), while in *Ruberoid* discriminations in sales *to* applicators were among those held to be in violation of 2(a). *General Shale*, mistakenly relied upon by *Clairol*, corresponds in its facts and in principle with *Detroit Sheet Metal*, while this case corresponds in its facts and in principle with *Atlas* and *Ruberoid*. *Atlas* and *Ruberoid*, moreover, correspond in relevant facts and in principle with *Corn Products*, 324 U.S. at 731.¹⁹ The decision in *Corn Products*, therefore, gave effect to the Congressional purpose that Sections 2(c), 2(d) and 2(e) were to prevent evasion of Section 2(a)—a

¹⁹ The 2(a) price-discrimination violations in *Corn Products* also involved sales of corn sugar to candy manufacturers.

purpose which would be frustrated if the exemption sought by Clairol and Corn Products were granted.²⁰

Clairol also mistakenly relies upon *Mueller v. United States*, 262 F.2d 443 (5th Cir. 1958), as support for its contention that the fact that its products are applied to a salon customer's hair by salon employees makes what the salon sells exclusively a "service" and not a product (Clairol brief, pp. 9-10). Clairol does so by relying upon about half of a dictum by the court rather than its ruling, and by misunderstanding the Commission's statement concerning that decision in its opinion in this case. The issue in *Mueller* was whether false advertisements, of the supposed efficacy of baldness treatments in which products were applied to bald scalps, were for sales of treatments only, and not of the products applied. The part of the court's preliminary dictum which Clairol neglected to quote is (262 F.2d at 448): "On the other hand, we purchase material as well as tailoring when we buy a tailored suit." The court's dictum, it is clear, was a preliminary marking out of the inapplicable extremes between which hair treatment lies, for it immediately followed that dictum by saying (262 F.2d at 449):

Here, however, we do not have to draw any fine distinction between the sale of a service and the

²⁰ Section 2(c) has also been applied to situations like that in *Corn Products*. See, e.g., *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166 (1960), where the seller's products (fruit concentrates) were processed by the buyer into apple butter and preserves. See 261 F.2d 725, 726 (7th Cir. 1958), for a recital of these facts, which were not mentioned in the Supreme Court's opinion.

sale of a product along with a service. In this case the advertisements show that Mueller represented that the chief thing he had to offer was the miraculous effect produced by his cosmetic preparations. The sale of the office treatment was a transaction where an appreciable part of the consideration for the service was a payment for the material. In addition, Mueller sold directly to consumers his cosmetics and home treatment kits.

Thus the court held that Mueller's advertisements of office treatments were for sales of the products as well as of their application. If any part of that decision is of significance here it is the ruling concerning sale of hair treatment products, not the preliminary dictum about shaves, shoe shines, and tailored suits. As in *Mueller*, it is true here that "an appreciable part of the consideration for the service was a payment for the material."²¹

The Commission did not regard the *Mueller* ruling as dispositive here because it does not involve the Clayton Act and the Congressional purpose to prevent discriminations between customers; the Commission did, however, rely upon it as standing for "the proposition that the determination of whether a transaction constitutes a sale of a product must be decided on the basis of all the surrounding circumstances in the particular proceeding" (Tr. 98-99). *Mueller* clearly stands also for the general proposition that a seller's application of a product to the person of its customer does not preclude a holding that the product is being

²¹ See *supra*, p. 14; p. 24, n. 18.

sold, as also does this Court's decision in *Ratigan v. United States*, 88 F.2d 919, 921-22 (9th Cir. 1937), *cert. denied*, 301 U.S. 705.

Clairol also mistakenly relies upon a number of other decisions, principally product-liability cases, which plainly have nothing to do with a reviewing court's decision as to the construction which should be given to the provisions of a remedial statute, such as the amended Clayton Act, by the administrative agency principally charged by Congress with the responsibility of construing, applying and enforcing it and the policies it embodies. The law of sales, as applied in product-liability cases in which a manufacturer may escape liability for damages for injuries from the use of its products, no matter how valid it may be as applied to private contract or tort circumstances in those cases, cannot be used as a bar to administrative, remedial and preventive enforcement of federal antitrust policy. Compare *Simpson v. Union Oil Co.*, 377 U.S. 13, 18 (1964).²²

²² Much of Clairol's argument depends upon its preliminary contention (Clairol brief pp. 13-15) that the term "distribution" in Section 2(d) is synonymous with "resale." Although that contention is essential to Clairol's argument, its rejection is not essential to the Commission's decision, because the Commission properly determined, on the basis of the actual facts and the authority of *Corn Products*, that the salons' transactions include resales of Clairol products. But, as the Commission pointed out (Tr. 103, n. 13), its holding "does not mean that for Section 2(d) to apply there must be a 'resale' in all cases. We merely hold here that once the Commission finds that a transaction may be equated with a

As the Supreme Court stated in *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367 (1965), "where the Congress has provided that an

resale, it necessarily satisfies the requirement of distribution under Section 2(d)."

The Congressional purpose in adding Section 2(d) to the Act was to protect small competitors from discriminations in favor of "large buyer customers." S. Rep. No. 1502, 74th Cong., 2d Sess., 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess., 15-16 (1936). Nothing in the reports suggests that the only buyers the Congress sought to protect were those whose "distribution" consisted exclusively of resales, and its choice of language in Section 2(d) strongly suggests the contrary. The language, including the term "distribution," was adopted in 1936. Webster's *New International Dictionary* (2d Ed. 1938) contains no definition equating the words "distribute" or "distribution" with "resale." The former it does define, however, as "1. To divide among several or many; to deal out; apportion; allot," and gives as synonyms "share, assign, divide." It gives a similar definition of "distribution," and also: "8. *Econ.* a Physical conveyance of commodities from producers to consumers; transportation," and gives as synonyms "apportionment, allotment, dispensation, disposal, dispersion, arrangement."

Alsager, *Dictionary of Business Terms* (1932) 95, gives a similar definition: "Distribute—To divide among several; to classify; to assort." It too gives no definition suggesting a sense equivalent to "resale."

Schwartz, *Dictionary of Business and Industry* (1954) 181, gives a single definition of "distribution": All of the activities involved in the passage of goods from the producer to the consumer."

Certainly the salons' transactions fit the stated Congressional purpose and those definitions, whether or not they also constitute sales of Clairol products. Thus, both of the contentions essential to Clairol's argument are erroneous.

administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision 'has "warrant in the record" and a reasonable basis in law'." See also *United States v. Drum*, 368 U.S. 370, 375-76 (1962), *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944), and *Gray v. Powell*, 314 U.S. 402, 411 (1941). In the latter case the Court said: "In a matter left specifically by Congress to the determination of an administrative body * * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing * * * and an application of the statute in a just and reasoned manner." See also *P. Lorillard v. Federal Trade Commission*, 267 F.2d 439, 443-44 (3d Cir. 1959), *cert. denied*, 361 U.S. 923, and *Purolator Products, Inc. v. Federal Trade Commission*, 352 F.2d 874, 883-84 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045.

Upon the facts of this case, and in view of the language and purposes of the statute, we submit that the Commission's construction of Section 2(d), as applicable to Clairol's promotion-payment discriminations between its beauty salon customers, has ample warrant in the record and a reasonable basis in law.

II. The modified order proposed herein is reasonably related to the violations of law found by the Commission, and conforms to the Supreme Court's decision in *Fred Meyer, Inc.*

In this case the Commission, as it had in *Fred Meyer*, viewed the seller's obligation under Section 2 (d) as including that of making its promotional pay-

ments available to suppliers purchasing directly from it, and reselling to direct competitors of favored direct-purchasing retailers (Tr. 107-108). It accordingly drafted a form of cease-and-desist order requiring Clairol to do so, with respect both to retail stores and beauty salons (Tr. 85-87). That order was issued before the decision in *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), in which the Court held that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" for Section 2(d) purposes, and to whom the seller must make its payments available. That decision has rendered inappropriate the form of order issued by the Commission in this case, which therefore must be modified to accord with the Supreme Court's ruling.

Because Section 11(d) of the amended Clayton Act (73 Stat. 243; 15 U.S.C. 21(d)) provides that upon filing the record the reviewing court acquires exclusive jurisdiction of the matter, the order in this case has not been modified by the Commission. Although the Commission has not been able to act formally, it has informally considered the matter and determined the form of modified order it believes should be entered in this case. The modification consists essentially of deleting sub-paragraphs 1(b) and 2(b), which pertain only to wholesalers, adding to sub-paragraphs 1(a) and 2(a), which pertain respectively to retail stores and beauty salons, the phrase "including retailer customers who do not purchase directly from respondent," and redesignating those two as paragraphs 1 and 2. As so modified it would read as follows:

IT IS ORDERED that respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers, as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of such products, unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the distribution of such products to consumers for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products, unless such payment or consideration is available on proportionally equal terms to all other beauty salon customers of respondent, including beauty salon customers who do not purchase directly

from respondent, who compete with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products.

This proposed modified order differs in three principal respects from the modifications which Clairol asks this Court to make (Clairol brief pp. 28-29).

First, the modified order would be in two paragraphs, the first treating discriminations with respect to retail stores and the second treating discriminations with respect to salons. Clairol's proposed modification would result in an order in two paragraphs, each containing two sub-paragraphs, the first sub-paragraph treating discriminations between direct purchasing customers and the second treating discriminations involving customers buying through wholesalers. In so doing Clairol's proposal would follow the format of the Commission's original order, made necessary there by the Commission's conception of the seller's obligation, and no longer necessary in view of the Supreme Court's different concept of that obligation. We believe it is obvious that issuance of an order drafted in such consolidated paragraphs would not be an abuse of the Commission's discretion.

Second, the foregoing proposed modified order would require Clairol to make its payments available to competing retail stores and to competing beauty salons regardless of how many levels of intermediate distributors intervene between Clairol and the stores or salons. The modifications of the order which Clairol suggests that the Court make would not require proportionally equal payments to any customer buy-

ing through more than one level of intermediate distributors. The Supreme Court's ruling in *Fred Meyer, Inc.*, as to the seller's obligation was not limited as to number of intermediaries between the seller and its retail-level "customers." Such a limitation would be contrary to the intent of the statute, noted by the Court in *Fred Meyer, Inc.* (390 U.S. at 352), "to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read customer as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of § 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class."

The Congressional purpose was to protect all competing small retailers, including those who may purchase through more than one level of intermediate distributors, not merely those who purchase through only one level. The substance and rationale of the *Fred Meyer, Inc.*, decision is that Section 2(d) requires a seller who makes promotional payments to or for the benefit of a distributor of its products at any functional level, to make proportionally equal payments available to all other distributors of those products competing with the favored distributor at that level.

There was no finding in this case that Clairol products never reach the retail level through more than one level of intermediate distributors. The Commission found (Tr. 49, I.D. finding 10) that Clairol sells its products to, *inter alia*, customers named as "beauty supply dealers," "drug wholesalers," and "rack

jobbers." There was no finding that all of those named intermediaries sell only directly to retail stores or to salons, and even if there had been such a finding, it would not require limitation of the order's coverage. Commission orders are supposed to close all roads to the prohibited goal, so that they may not be by-passed with impunity. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-29 (1957). Clairol's proposed order would enable it to continue its discriminations by the device of selling to disfavored customers only through two or more levels of intermediate distributors. We believe it is obvious that it would not be an abuse of the Commission's discretion for it to issue an order not so easy to by-pass.

The third difference between the foregoing proposed modified order and the modifications which Clairol asks this Court to make is also in the order's prohibitory coverage. The Commission's proposed order would prohibit all discriminations between competing Clairol customers regardless of whether they purchase directly or through intermediaries. Clairol's proposed order would not do so. It would prohibit discriminations only where the favored customers, or both the favored and disfavored customers, purchase directly. It would not prohibit discriminations where the favored customer, or both the favored and disfavored customers, purchase through intermediaries. We believe it is clear that it would be appropriate for the Court to modify the Commission's order so that it could not be by-passed by selling to favored customers only through intermediate distributors.

In *National Lead, supra*, 352 U.S. at 428, the Court said that “the Commission is clothed with wide discretion in determining the type of order that is necessary to bring to an end the unfair practices found to exist,” and is “the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.” It held that the Commission “has wide latitude and judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.” *Accord, Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

Accordingly, we request that the Court modify the Commission’s order to cease and desist as suggested herein, after which the Commission, at the appropriate time as provided in Section 11(i) of the Clayton Act (15 U.S.C. 21(i)), will modify its order to comply with the judgment of the Court.

CONCLUSION

For the foregoing reasons the Commission's order should be modified as requested and affirmed and enforced as so modified.²³

Respectfully submitted.

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October 1968

²³ "To the extent that the order of the Commission * * * is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission * * *." Clayton Act, Sec. 11(c), 73 Stat. 243, 15 U.S.C. 21(c).



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NO. 21242

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

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FILED

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IN THE UNITED STATES COURT OF APPEALS
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vs.

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Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On April 13, 1966, a one count indictment was returned by the Grand Jury for the Southern District of California, charging appellant with a violation of Title 18, United States Code, Section 659, Theft From Interstate Shipment [C. T. 17-18]. 1/

On April 25, 1966, appellant was arraigned and entered a plea of not guilty to indictment No. 36056 [C. T. 19].

On May 10, 1966, a superseding one count indictment was returned by the Grand Jury for the Southern District of California, charging appellant with a violation of Title 18, United States Code,

1/ "C. T. " refers to Clerk's Transcript of Appeal.

Section 659, Theft From Interstate Shipment [C. T. 2-3]. The indictment charged that on or about March 25, 1966, the appellant stole and unlawfully took and carried away, with intent to convert to his own use, from a platform, five shipments of goods, consisting of 25 cartons, having an aggregate value of over \$100.

On May 11, 1966, appellant was arraigned on superseding indictment No. 36152 [C. T. 4]. The jury was impaneled on May 11, 1966 [C. T. 4]. Trial was held on indictment number 36152 on May 11, 12, 16, and 17, 1966 [C. T. 4-7]. On May 17, 1966, the appellant was found guilty as charged in the indictment [C. T. 7].

On June 15, 1966, the appellant was found to be 25 years of age and accordingly sentenced to five years' probation pursuant to the Young Adult Offenders Act, Title 18, United States Code, Section 5010(a) [C. T. 8-9].

Appellant filed a timely Notice of Appeal on June 27, 1966 [C. T. 10-12].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 18, United States Code, Section 659. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.



II

STATUTE INVOLVED

Title 18, United States Code, Section 659:

"Whoever embezzles, steals, or unlawfully takes, carries away, . . . from any station, station house, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; . . .

"Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

III

STATEMENT OF FACTS

The West Coast Cartage Company is a local agent for Acme Fast Freight. In that capacity West Coast Cartage Company receives freight from throughout the United States and delivers it within the Los Angeles area [R. T. 43-44]. 2/ It operates from a loading dock located in the downtown Los Angeles area. The

2/ "R. T. " refers to Reporter's Transcript of the Trial.

loading dock is 800 feet long by 60 feet wide and West Coast Cartage Company shares the facilities with certain other carriers [R. T. 47].

Freight is brought to the loading dock by railroad boxcars and semi-trailers. The freight is removed from the incoming cars by a night crew and placed upon the loading dock [R. T. 48]. The freight is then checked against a tally on each particular car to make sure that the freight which was scheduled to be on the car is present. The night crew then checks the tally against each piece of freight to determine from what departure door or "spot number" the freight will leave the loading dock. Each spot number represents an individual loading door from which one truck is to be loaded. West Coast Cartage loads its trucks from doors number 9 through 24. The remaining doors are used by other carriers [R. T. 86].

After determining the proper loading door the night crew marks the number of the departure door on the individual piece of freight with a green crayon [R. T. 50]. The freight is then loaded on a towvair to be taken to the proper departure door. The towvair is a four-wheel dolly which is placed on a continuous cable and is released from the cable and directed onto a spur leading to the departure door by a pre-set magnetic solenoid [R. T. 50-51, 90-91]. The freight is then unloaded from the towvair and placed on the floor in front of the departure door [R. T. 92]. If the freight is found at the door in a proper sequence for loading, one of the night crew may begin to load a truck at a particular loading door [R. T. 92].



When a truck driver arrives at work in the morning, he obtains his driver's load record in front of his departure door. The driver's load record consists of bills of lading routed in reverse order of delivery [R. T. 61]. The load record is prepared by the dispatcher and is routed in such a manner that the top bill will be his last stop and the bottom bill of lading his first stop [R. T. 61]. The driver uses this load record to sequence the loading of his truck. By following this procedure the last delivery for the day, which is represented by the top bill, will be at the front of his truck while his first delivery will be at the rear [R. T. 62]. When he loads his truck the driver is instructed to make certain notations and follow certain procedures with regard to his load record. If he finds all the freight shown on a bill of lading he loads the freight on his truck, circles the number of cartons indicated on the bill of lading and initials the bill of lading. This indicates to the dispatcher that the driver has all of the freight represented by a particular bill of lading on his truck [R. T. 62-63]. If the driver has more than one half of the freight indicated by a bill of lading, he would load the freight on his truck, mark the number of cartons loaded on the bill of lading, indicate the number of cartons he is short and initial the bill [R. T. 63]. If the driver is not able to find the freight, he folds his bill of lading in half. If the driver is only able to find less than one-half of the freight, he leaves the freight on the dock and folds the bill of lading [R. T. 64]. A folded bill of lading indicates to the dispatcher that freight is not on a driver's truck [R. T. 64]. The driver is instructed not to load

freight without a bill of lading [R. T. 71].

After a driver has finished loading his truck he takes his driver's load record to the dispatcher's office. The dispatcher takes the driver's load records and removes the folded bills [R. T. 64]. The folded bills are retained by the dispatcher so he can attempt to locate the freight. The dispatcher matches the remaining bill with two different copies and gives them to the driver for his deliveries [R. T. 64-65]. The dispatcher does not go out and check the freight on the truck [R. T. 119]. The driver then gets in his truck and leaves the loading dock.

Appellant was employed by West Coast Cartage as a truck driver [R. T. 53]. He loaded his truck out of loading door number 11 [R. T. 59, 168] and made deliveries to Santa Monica, Culver City, Venice and parts of West Los Angeles [R. T. 95, 272].

On March 25, 1966, appellant came to work at West Coast Cartage and loaded his truck [R. T. 281]. At the time appellant started to load his truck one carton had been placed on the truck by a night loader, Robert Carreno [R. T. 117, 159]. Appellant loaded the remainder of his truck without assistance [R. T. 122, 281, 292, 325, 333-336]. After he loaded the truck, he closed the doors on the truck and latched them [R. T. 123]. He then took his driver's load record to the dispatcher's window [R. T. 123]. He handed his driver's load record to the dispatcher and made no comment concerning his load [R. T. 209, 221].

The general manager of West Coast Cartage told the dispatcher to give the load record back to appellant as his load was

going to be checked [R. T. 56]. Appellant was told that his load was to be checked and that he was to give his load record to either Mr. See or Mr. Richardson who would check his load [R. T. 56-57]. Appellant then turned around, walked right by Mr. See, opened the doors on his truck and started to unload [R. T. 57, 125]. Appellant had unloaded eleven cartons before he was stopped by Mr. See [R. T. 126]. Mr. See then had the entire truck unloaded and checked all the freight against appellant's driver's load record [R. T. 128]. He found that out of the entire load there were five shipments consisting of 25 cartons for which appellant had either no bill of lading or had folded the bill of lading to indicate the freight was not on his truck. All twenty-five of these cartons were located at the immediate rear of appellant's truck, with a space of four to five feet between those cartons and the remainder of his load [R. T. 132].

An examination of the five shipments disclosed the following information:

1. One carton of furniture addressed to H. G. Leroy, 3300 Stoner Avenue, Los Angeles, California. This carton was loaded at the rear of the truck isolated with the other 24 from the remainder of the load [R. T. 132]. The bill of lading was folded indicating the freight was not on his truck [R. T. 129].

2. Thirteen cartons of shoes addressed to Joseph Bloom, c/o Charlstons, 3816 Culver Center, Culver City, California. Appellant had thirteen cartons of this seventeen-carton shipment on his truck [R. T. 129, 130]. The bill of lading was

folded indicating appellant did not have this freight on his truck [R. T. 130]. These thirteen cartons were located at the immediate rear of the truck although the appellant's driver's load record indicated that they would have been delivered on his ninth stop [R. T. 132].

3. Two cartons of clothing addressed to Fredericks of Hollywood, 6608 Hollywood Boulevard, Hollywood, California. Appellant had these cartons on his truck without a bill of lading [R. T. 130]. They were located at the immediate rear of the truck [R. T. 132]. This delivery was not in appellant's assigned area [R. T. 272]. It was delivered by an outside contract carrier, Pacific Motor Truck [R. T. 130]. The carton had a circled number 48 in green crayon which indicates that it should have been at the 48 spot, not appellant's spot number 11 [R. T. 82].

4. Six cartons of shoes addressed to Rains Shoe, 466 East Main Street, Ventura, California. These six cartons were located at the rear of appellant's truck and he had no bills of lading for them [R. T. 131, 132]. One of the cartons had the circled number 47 and 48 written on the side in green crayon. This indicates that it went to the 48 area where it was again assigned to the 47 spot [R. T. 80]. The 47 spot is another trucking company. It would go to this trucking company because Ventura is out of the delivery area of West Coast Cartage [R. T. 80].

5. Three cartons of clothing addressed to Jerry Brills, 1408 3rd Street, Santa Monica, California. These cartons were located at the immediate rear of appellant's truck [R. T. 131-132].

Appellant had no bill of lading for these cartons [R. T. 131].

Appellant was questioned on two separate occasions with regard to the presence of these cartons on his truck [R. T. 59, 128]. On both occasions he indicated he was going to deliver some of the freight for Jerry Andrade [R. T. 59, 128]. He also indicated that he confused the shoes with a White Front Stores delivery [R. T. 59]. Jerry Andrade testified that he did not request appellant to deliver freight [R. T. 168], and further that White Front shoes arrive in a special kind of carton that is not similar to the ones found on appellant's truck [R. T. 178].

It was stipulated that the five shipments of goods were moving in interstate commerce [R. T. 41]. It was further stipulated that the total value of the goods mentioned in the indictment is \$5,920.45 [R. T. 43].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 3/

1. It was error to deny appellant's motions for judgment of acquittal, made at the end of the Government's case, defendant's case and renewed after return of the jury verdict, where the West Coast Cartage Company at all times

retained possession of the freight, so that no theft could have occurred.

2. It was error to deny appellant's motions for judgment of acquittal or for a new trial when the evidence reasonably indicated mistake, carelessness, and processing of freight according to the usual company procedures, thereby negating any intent to convert the goods to appellant's use.
3. It was error to deny appellant's motion for judgment of acquittal or for a new trial because there was insufficient evidence to uphold a verdict of guilt.

V

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO SHOW AN UNLAWFUL TAKING OR CARRYING AWAY FROM A FREIGHT PLATFORM.

The appellant is charged with a violation of Title 18, United States Code, Section 659. That statute is framed in the disjunctive. It reads in pertinent part, " . . . whoever embezzles, steals, or unlawfully takes, carries away . . . from a platform . . . with intent to convert to his own use . . . " shall be guilty of an offense. The indictment, however, is framed in the conjunctive. It charges that appellant "stole and unlawfully took and carried away, with the

intent to convert to his own use, from a platform . . . " certain shipments [C. T. 2-3]. While the indictment charges in the conjunctive it is sufficient that the government prove appellant stole or unlawfully took or carried away from a platform certain goods with the requisite intent.

Crain v. United States, 162 U.S. 625 (1895);

Cunningham v. United States, 356 F.2d 454

(5th Cir. 1966).

The evidence introduced by the government was sufficient to show that appellant unlawfully took or carried away the five shipments of goods from the West Coast Cartage freight platform. When appellant came to work on March 25, 1966, only one carton had been placed on his truck [R. T. 117, 159]. The remaining cartons were on the loading dock. To load the truck it was necessary for the appellant to pick up the cartons and transfer them from the loading dock to the truck he was assigned. This act of moving the cartons from the loading dock was at common law a sufficient asportation when coupled with the proper intent to constitute theft. For at common law any removal, however slight, was sufficient to constitute the required asportation. People v. Meyer, 75 Cal. 383 (1888). The rule would be the same in the interpretation of 18 U.S.C. §659. Sterling v. United States, 333 F.2d 443 (9th Cir. 1964).

The appellant loaded the remainder of his truck without assistance [R. T. 122, 281, 292, 325, 333-336]. He then closed and latched the doors [R. T. 123]. He took his driver's load record

and handed it to the dispatcher [R. T. 123]. On a normal day the dispatcher would remove the folded bills of lading from the driver's load record [R. T. 64]. These bills are retained in order that the dispatcher may attempt to locate the freight on the loading dock [R. T. 64-65]. The dispatcher does not go out to a driver's truck and check the load against the load record [R. T. 119]. He gives the driver his delivery copies of the bills of lading and the driver leaves [R. T. 64].

When the appellant loaded his truck and closed the doors he had removed the cartons from the dock without authority. On three of the five shipments he had no bills of lading. A driver was instructed not to load cartons without bills of lading [R. T. 71]. On the other two shipments he had folded the bills of lading. Folded bills of lading indicate that freight is not on a truck [R. T. 64]. As to each of the five shipments, the West Coast Cartage Company records would indicate that the freight had either not arrived on the loading dock or although it had arrived it was somewhere on the loading dock. In the normal course of business, West Coast Cartage Company would have no knowledge that appellant had loaded the 25 cartons of goods on his truck. Thus at the time appellant presented his load record to the dispatcher to pull the folded copies, the shipments on his truck were under his control. He had clearly asserted control over the goods by removing them from the loading dock and placing them in his truck.

The appellee can find no case parallel to these facts. Perhaps the closest in argument is Kelley v. United States, 166 F.2d

343 (9th Cir. 1948). In Kelley a custodial employee of the United States Post Office was charged with secreting, embezzling, detaining, delaying and opening mail. The evidence showed that two test mail packages were deposited at different locations in the post office where appellant would pass in the course of his janitorial duties. A postal inspector observed the appellant to pick up one of the packages, throw it on his pile of trash, and sweep it away. The trash was then placed in a trash hamper. Shortly thereafter the appellant's trash hamper was examined and it was found to contain both test packages. Appellant claimed that the evidence failed to show that he had committed any of the acts charged in the indictment. This assertion was predicated on the theory that appellant's throwing the packages into his trash collection did not remove them from the mail or the custody of the post office. It was shown that the trash collected by custodial employees customarily went to the post office basement where it was sorted before disposal. Thus the trash hamper was under Post Office control. This Court held that the existence of the basement check procedure made appellant's diversion of the packages no less unlawful. From the evidence, it was clear that appellant took the packages into his possession when he unlawfully removed and concealed them: the crime was then completed.

Kelley v. United States, supra, at 346. The argument in Kelley would seem to control in the case now before the Court. Our case is even stronger for the reason that in the normal course of events there would be no check of appellant's truck where as in Kelley the

mail hamper would be checked in the basement. Further, the fact that appellant had not entered the truck and started to drive away from the dock before he was stopped should not control. In Kelley, the letter was not removed from the hamper by the appellant.

Therefore, the appellant herein had taken or carried away the goods from the loading dock when he removed them from their proper location and placed them in his truck.

B. THE EVIDENCE WAS SUFFICIENT TO
PROVE APPELLANT INTENDED TO
CONVERT THE CARTONS TO HIS OWN USE.

For the appellee to meet its burden of proof, it is necessary to prove that the appellant unlawfully took or carried away certain goods with, "the intent to convert them to his own use". As the appellee cannot look into the mind of the appellant, it is required to meet this burden of proving appellant's state of mind by circumstantial evidence.

Cramer v. United States, 325 U.S. 1 (1945).

The appellant loaded all but one carton on his truck. When the truck was unloaded and the cartons checked against his driver's load record, it was discovered that out of the entire load there were but five shipments on which the appellant had erred. These five shipments contained 25 cartons for which appellant had either no bill of lading or had folded the bill of lading. All 25 of these cartons were located at the immediate rear of the truck, with a space of four to five feet between them and the remainder of the

load [R. T. 128-132]. The fact that the remaining 475 cartons on the truck were loaded correctly would indicate that appellant took care in loading [Government Exhibit 47] and that he checked the cartons against the bills of lading before placing the cartons on his truck. And yet he had two shipments of cartons with addresses clearly outside of his delivery area on his truck [R. T. 80, 272]. Further these cartons had circled spot numbers that did not correspond with appellant's delivery door [R. T. 80, 82]. In the other three shipments he had loaded the cartons without a bill or loaded the cartons and folded the bill.

Appellant's conduct further demonstrates his criminal intent. When he took his load record to the dispatch window he was directed to give it to Mr. Richardson or Mr. See who would check his load [R. T. 56-57]. Appellant then turned and walked right past Mr. See and started to unload [R. T. 57, 125]. Mr. See then approached appellant and checked the load for discrepancies. He found the five shipments and when appellant was confronted with the discrepancy in his load he had two explanations. He indicated to two persons, Mr. See and Mr. Cowden, that some of the cartons were being delivered for Jerry Andrade and others had been mixed up with a White Front shoes delivery [R. T. 59, 128]. Jerry Andrade testified that he did not request appellant to deliver any cartons for him [R. T. 168]. Further appellant denied making these statements at the time of trial [R. T. 305-306]. White Front shoes are made by one manufacturer, Morris Shoe [R. T. 229]. The shoes that appellant allegedly mistook for White Front shoes

were Florsheim shoes and Florsheim shoes were not sent to White Front stores [R. T. 229]. Finally, White Front shoes came in on easily distinguishable cartons that are not similar to the cartons on appellant's truck [R. T. 178].

Appellant claims that the evidence showed merely carelessness or mistake. 4/ The appellee admits that mistakes frequently occur on the loading dock. However, the evidence elicited during the trial indicates that the loading of the cartons was an intentional act on appellant's part to convert the cartons to his own use. For as Mr. See testified he has never known of a situation where 25 cartons addressed to five different consignees were loaded by mistake [R. T. 136].

C. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The jury, by its verdict of guilty, resolved all factual doubts in favor of the government.

It was stipulated that the shipments were moving in interstate commerce and that the total value of the goods mentioned in the indictment was \$5,920 [R. T. 43]. The remainder of the evidence was set forth in detail in the statement of facts and argued in Points A and B of Appellee's Brief. To again set forth that evidence would be repetitious.

4/ Appellant's Brief, page 16.

Viewing the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U. S. 290 (1961);

Byrne v. United States, 327 F.2d 825

(9th Cir. 1964);

Mosco v. United States, 301 F.2d 180

(9th Cir. 1962).

VI

CONCLUSION

For the reasons above stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROGER A. BROWNING,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

ROGER A. BROWNING
Assistant U. S. Attorney

In the
United States Court of Appeals
For the Ninth Circuit

NAGATAKA MURAYAMA and
OFUJI MURAYAMA,

Appellants,

vs.

TIME INC., a corporation,
Appellee.

No. 21247

PRAYER FOR JURY

MELVIN M. BELLI
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Attorneys for Appellants

FILED

1961

U.S. COURT OF APPEALS

In the
United States Court of Appeals
For the Ninth Circuit

NAGATAKA MURAYAMA and
OFUJI MURAYAMA,

Appellants,

vs.

TIME INC., a corporation,

Appellee.

No. 21247

PETITION FOR REHEARING

TO THE HONORABLE RICHARD H. CHAMBERS, Circuit Judge,
M. OLIVER KOELSCH, Circuit Judge and
BEN. C. DUNIWAY, Circuit Judge.

Appellants, NAGATAKA MURAYAMA and OFUJI MURAYAMA, hereby
petition for a rehearing to reconsider the judgment entered in
this action on October 11, 1966, on the following grounds.

The question involved herein is one of considerable public
importance and it should be considered by the court en banc.
The question relates to what constitutes excusable neglect on
the part of an attorney in timely docketing an appeal under
rule 73 (g) of the Federal Rules of Civil Procedure.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: November 8, 1966.

BELLI, ASHE, GERRY & ELLISON

By: Robert L. Luff
Attorneys for Appellants
Nagataka Murayama and
Ofuji Murayama

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

ROBERT L. LIEFF, having first been duly sworn,
deposes and says:

On November 8, he served the within Petition for Rehearing upon appellees by mailing true copies thereof to their attorneys, JOHN B. BATES, NOBLE K. GREGORY, JAMES F. KIRKHAM and PILLSBURY, MADISON & SUTRO, Standard Oil Building, San Francisco, California.

Robert L. Lieff

Subscribed and sworn to
before me this 8th day
of November, 1966.

Monica Lang
Notary Public
State of California
My commission expires 6-24-70

N O. 2 1 2 4 9 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELVIN CHARLES HULL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MANUEL L. REAL,
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FILED

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WM. B. LUCK, CLERK

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N O. 2 1 2 4 9
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELVIN CHARLES HULL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION
AND
STATEMENT OF THE CASE

A. Pre-trial Proceedings.

On March 2, 1966, a two-count indictment was returned by the Grand Jury for the Southern District of California, charging appellant with violation of Title 18 U.S.C. 2115, breaking into a building used as a Post Office [C. T. p. 2]. ^{1/} On April 25, 1966, appellant was arraigned before the Honorable Irving Hill, at which

1/ "C. T. " refers to Clerk's Transcript of Record.

time counsel was appointed by the District Court to represent appellant. Upon motion of appellant's counsel the District Court appointed a psychiatrist to examine appellant pursuant to the provisions of Title 18 U.S.C. 4244 [C. T. p. 4]. On May 16, 1966, a competency hearing was held before Judge Hill. On that date the District Court found the appellant presently sane and mentally competent so as to be able to understand the proceedings against him and to assist in his own defense [C. T. p. 5]. Thereafter the appellant entered a plea of not guilty to both counts of the indictment, and the case was set for trial on May 31, 1966.

B. Trial Proceedings.

On May 31, 1966, the case was transferred for trial before the Honorable Ray McNichols. Preliminary to the presentation of the appellant's case, a hearing was held on the admissibility of statements made by appellant to law enforcement officials. At this hearing Detective Larry Reid of the Clark County Sheriff's office and U. S. Postal Inspector D. L. DeLaney testified for the appellee. The appellant, Melvin Charles Hull, testified in his own behalf. (The appellant did not testify at the trial.) [C. T. p. 8]. At the conclusion of the hearing the Court ruled that the appellant's statements had been voluntarily given and that no delay in arraignment had occurred [R. T. pp. 3-61].^{2/} On June 1, 1966,

^{2/} "R. T. " refers to Reporter's Transcript of Record.

the appellant was convicted on both counts of the indictment after a trial by jury. On June 3, 1966, the appellant was sentenced to the custody of the Attorney General of the United States for a period of four years on Count One of the indictment and four years on Count Two of the indictment, the sentence on Count Two to run concurrently with the sentence on Count One. The appellant was made eligible for parole under Title 18 U. S. C. 4208(a)(2) [C. T. p. 12].

C. Jurisdiction

Jurisdiction of the District Court was founded upon Title 18 U. S. C. 2115 and 3231. A timely appeal was taken to this Court pursuant to Title 28 U. S. C. 1291, 1294(1) [C. T. p. 18].

II

STATUTE INVOLVED

Title 18 U. S. C. 2115 provides as follows:

"Whoever forcibly breaks into or attempts to break into any Post Office, or any building used in whole or in part as a Post Office, with intent to commit in such Post Office, or building or part thereof, so used, any larceny or other depredation, shall be fined not more than \$1,000.00 or imprisoned not more than five years, or both."

III

STATEMENT OF FACTS

A. Pre-Arrest

On February 9, 1966, the East Los Angeles Branch of the U. S. Post Office, 975 S. Atlantic Boulevard, Los Angeles, California, was broken into and burglarized [R. T. pp. 73-74]. On February 11, 1966, the Bailey Station of the U. S. Post Office, 139 North Washington Avenue, Whittier, California, was broken into and burglarized [R. T. pp. 79-81].

Detective Larry Reid, Clark County Sheriff's Office, testified that on Saturday, February 12, 1966, at approximately 11:00 p. m., he and his partner, Detective Rutkowski, were dispatched to the Hirsch Check Cashing Agency, in Las Vegas, Nevada, to investigate an attempted forgery [R. T. p. 95, lines 5-8]. There he was informed by the proprietor that a person had attempted to cash a check but had been refused because of suspicious circumstances [R. T. p. 95, lines 9-13]. At the hearing on the motion to suppress, Detective Reid described the suspicious circumstances, i. e., that the California driver's license presented as identification was not validated, and the party listed his phone number as having eight digits [R. T. p. 9, lines 23-25; p. 10, lines 1-2]. Additionally, Detective Reid was informed that after the subject left, the true payee was contacted by the Hirsch Check Cashing Agency and he denied granting authority for anyone else

to receive or cash his check [R. T. p. 10, lines 11-13]. Detective Reid further testified that the proprietor related to him that the payee's name on the check was John Roy Griffin [R. T. p. 10, line 11]. Detective Reid continued by stating that the proprietor related he had observed the party leave the Hirsch Check Cashing Agency in a blue Cab No. 193. Prior to leaving the Hirsch Check Cashing Agency, a signed crime report for possible forgery was prepared. Detective Reid testified that the driver of Cab No. 193 was contacted and it was determined that he had transported a fare from the Hirsch Check Cashing Service to the Galaxie Motel [R. T. p. 90, lines 8-17]. At the Galaxie Motel it was ascertained that a person by the name of John R. Griffin was registered in Room 202 [R. T. p. 97, lines 4-10].

B. Arrest

A period of approximately two hours had elapsed in tracing the above described steps; thereafter at approximately 1:00 a. m., on Sunday, February 13, 1966, Detective Reid knocked on the door of Room 202. The door was opened by the appellant. Detective Reid identified himself and requested identification from the appellant. The appellant produced a California driver's license in the name of John Roy Griffin [Government's Exhibit #1; R. T. p. 98, lines 8-11]. Thereafter, Detective Reid asked the appellant if he had attempted to cash a large Treasury Check, to which inquiry the appellant replied affirmatively and at that time produced

the check [Government Exhibit #2; R. T. p. 98, line 25, p. 99, line 103]. Detective Reid testified that he then informed the appellant of the facts which he had ascertained respecting the check and identity of the payee, at which time the appellant stated, "Well, I might as well tell you, I am Melvin Hull and I was just released from Federal penitentiary" [R. T. p. 101, lines 18-22]. The appellant was placed under arrest and advised that " . . . he had a right to counsel and he did not have to make any statement at all" [R. T. p. 102, line 103]. The time was approximately 1:15 a.m. [R. T. p. 102, line 12]. The appellant was thereafter transferred to Clark County Sheriff's Office building. On route the appellant made a statement relating to the robbery of the Whittier Post Office, described in Count Two of the indictment [R. T. p. 103, lines 5-25; p. 104, lines 1-4]. The appellant arrived and was booked at the County Jail at 1:32 a.m. [R. T. p. 113, line 10]. Having consented to have his statement reduced to writing, the appellant, commencing at 2:10 a.m., repeated his part of the dialogue concerning the robbery of the Whittier Post Office to a stenographer. This oral statement was completed at 2:40 a.m. [R. T. p. 114, line 102]. The appellant was taken to his cell, and at approximately 4:00 a.m., he read, signed, and initialed the transcribed statement. The opening paragraph of this statement was read verbatim into the record. In substance it stated that Detective Reid had identified himself and advised the appellant of his right to advice of counsel before making any statement and that he need not make any statement at all or to

incriminate himself in any manner; that the appellant had waived his right to advice of counsel and voluntarily made the statement knowing that it could be used against him; that the statement was made of appellant's own free will without promise or hope of reward, fear, threat or physical harm [R. T. p. 20, lines 18-25; p. 21, line 109].

Mr. Donald DeLaney, Postal Inspector, U. S. Post Office Department, Las Vegas, Nevada, next testified that he interviewed the appellant at the Clark County Jail on Sunday morning, February 13, 1966, at approximately 9:30 a.m. The interview lasted approximately one hour [R. T. p. 125, lines 4, 5]. At that time, Inspector DeLaney testified that he identified himself to the appellant, advised him that he need not make a statement, that he had a right to counsel, and that any statement he did make must be voluntary and could be used against him in a court of law [R. T. p. 119, lines 20-25]. The appellant indicated that he understood these admonitions [R. T. p. 120, lines 2-3]. Thereafter, witness DeLaney testified as to the conversation had with the appellant relating to the facts surrounding the breaking into of both the Post Office in Whittier, California, described in Count Two of the indictment, and the breaking into the East Los Angeles Post Office described in Count One. The appellant's oral statement was subsequently reduced to writing and signed by the appellant on Monday morning, February 14, 1966, at approximately 10:00 a.m. [Government Exhibit #4; R. T. p. 123, lines 19-25; p. 124, lines 1-2, 10-18]. Postal Inspector DeLaney, during the pre-trial

hearing on the motion to suppress the appellant's statements, testified that at approximately 10:30 a. m. on Monday, February 14, 1966, he called the Postal Inspector's Office in Los Angeles, California, regarding the obtaining of a Commissioner's complaint. At approximately 1:00 p. m., Inspector DeLaney was informed that a complaint had been filed in the Southern District of California, charging the appellant with a violation of Title 18 U. S. C. 2115 [R. T. p. 32, lines 14-22]. Thereafter, Inspector DeLaney contacted the U. S. Commissioner A. G. Blad of Las Vegas, Nevada, and arranged that the appellant be arraigned at the Clark County Jail. Subsequently, the appellant was so arraigned [R. T. p. 33, lines 1-19].

The appellant, Melvin Charles Hull, testified only at the pre-trial hearing on the motion to suppress. At that time the appellant denied showing Detective Reid a California driver's license in the name of John Roy Griffin or a U. S. Treasury check in that name. The appellant stated both items were obtained by the officers in the course of a search of his motel room [R. T. p. 40, lines 1-22]. The appellant admitted that he was informed of his constitutional rights and that he need not make any statement [R. T. p. 40, line 25], but testified that Detective Reid "pushed on me and let me know that I might possibly receive physical abuse if I didn't make one" [R. T. p. 41, lines 3-7]. The appellant testified that he was fearful as a result of physical abuse he had received some six years earlier when arrested in another jurisdiction in connection with another offense [R. T. p. 42, lines

1-17]. The appellant further testified as to giving statements to both Detective Reid and Postal Inspector DeLaney.

On rebuttal, Detective Reid denied "pushing" the appellant and stated that he only placed his hand on appellant as a sign that he was under arrest [R. T. p. 58, lines 10-24].

IV

ARGUMENT

A. THE ADMISSIONS BY APPELLANT WERE VOLUNTARY.

1. Appellant's Statements to State Officers.

The first contact had by law enforcement officers with appellant was at 1:00 a. m. Sunday, February 13, 1966, when between 1:00 a. m. and 1:15 a. m. State Police Officers questioned him as to his identity [R. T. p. 13, line 16] and as to his activities earlier that evening [R. T. p. 15, lines 5-10]. During this period the officers contacted their office by telephone [R. T. p. 16, lines 4-8] and the appellant was placed under arrest at 1:15 a. m. [R. T. p. 17, lines 23-24]. He was advised of his right to an attorney and his right not to make a statement [R. T. p. 17, lines 4-8]. The appellant was transported to the Clark County Jail which took approximately 15 minutes [R. T. p. 18, lines 1-3]. On route to the County Jail the appellant made certain statements

relating to the Post Office burglary in Whittier, California [R. T. p. 18, lines 14-16]. The appellant was booked for forgery at the Clark County Jail at 1:32 a.m. [R. T. p. 113, line 10]. Thus, in a period of 32 minutes the appellant was identified, arrested, transported, made certain admissions, and was booked.

Between 1:32 a.m. and approximately 2:10 a.m. the appellant awaited the arrival of a stenographer to record his statement [R. T. p. 18, lines 18-25]. At 2:10 a.m. the appellant dictated his statement to a stenographer. This interview lasted a total of 30 minutes [R. T. p. 114, line 2]. The appellant was then returned to his cell. At approximately 4:00 a.m. the transcribed statement was brought to the appellant who read and signed it [R. T. p. 21, lines 12-24].

At all times appellant was advised as to his constitutional rights. At the time of his arrest at 1:15 a.m., the appellant was advised as to his right to an attorney and that he need not make a statement [R. T. p. 17, lines 4-8; p. 24, lines 22-25; p. 102, lines 1-3]. At the Clark County Jail at 2:10 a.m., prior to making his statement to a stenographer, the appellant was advised as to the nature of the interview of his right to the advice of counsel before making any statement, and his right not to make a statement. The appellant thereafter expressly waived his ". . . right to advice of counsel . . ." and acknowledged that his statement was voluntarily made knowing that it might be used against him at trial. The appellant further declared that his statement was made of his ". . . own free will without promise or hope of reward,

without fear or threat or physical harm, and without coercion . . . " [R. T. p. 20, lines 18-25; p. 21, lines 1-9]. These admonitions were again repeated at 4:00 a. m. and incorporated in the first paragraph of the statement appellant signed at that time [R. T. p. 21, lines 13-24].

The Court in clarifying the appellant's knowledge as to his rights asked him:

"Q. Did you know when you were arrested this time that you had a right to have an attorney, did you know this?

"A. Yes. " [R. T. p. 56, lines 20-23].

At the pretrial motion to suppress, appellant relied on the threat of physical abuse as the basis for negating the voluntary nature of his statement. Appellant claimed he was "pushed on" by Detective Reid as the latter was advising him of his right to make a statement [R. T. p. 41, lines 3-7]. When asked by his own counsel, "Did you receive any physical contact by the officer at any time?", appellant answered, "Just when he pushed on me" [R. T. p. 41, lines 17-19]. The appellant testified that he had some six years earlier been physically abused by other police officers in another city and that this affected his outlook on this occasion [R. T. p. 41, lines 24-25; p. 42, lines 1-19].

Detective Reid testified that the only time he placed his hand on appellant was to indicate that he was under arrest. Reid denied ever physically abusing the appellant. On redirect examination

Detective Reid testified:

"Q. Did you at any time ever push him up against a wall as he testified to?

"A. No.

"Q. Did you ever strong-arm him in any way?

"A. No. [R. T. p. 58, lines 20-25].

The Court questioned Detective Reid:

"The defendant indicated while you were telling him of his right at the same time you were telling him in such a way it might sound as though if he wanted attorney he would get pushed around. Did this occur?

"A. No." [R. T. p. 59, lines 12-18].

Appellant urges the application of Miranda v. Arizona, 348 U.S. 436, as it bears on the voluntariness of his statement. The holding of Miranda was not effective at the time of the trial of his case, May 31, 1966. Johnson v. New Jersey, 384 U.S. 719 (1966). Further, it is clear from the facts that the spirit of Miranda is not contravened in this case. The appellant was arrested at 1:15 a.m. and advised of his right to an attorney and that he need not make any statement. In the next few minutes after he was arrested and was being transported to the County Jail the appellant made certain admissions. Within 38 minutes after appellant arrived at the jail, after again being advised as to his rights, appellant repeated his statement to a stenographer. On cross-examination the

appellant testified that he read and signed the statement he made to Detective Reid [R. T. p. 52, lines 17-23], the first paragraph of which incorporates the lengthy admission given to him. Therefore, appellant's own admission, the testimony of the investigators, and the appellant's signed statement support his knowledge of his rights and his voluntary failure to exercise them.

With respect to appellant's contention that his statements were the product of intimidation or physical abuse, the record reflects that such charge is wholly unsubstantiated.

As the Court reflected,

" . . . I can't say the defendant in his own mind did not have some fear of apprehension. But I don't believe the officers so treated him to deprive him of his rights. . . ." [R. T. p. 60, lines 9-12].

2. Appellant's Statement to Postal
Inspector DeLaney.

Appellant contends that his signed affidavit subsequently given to Postal Inspector DeLaney was also involuntary [Government Exhibit #4] as being the product of the first unlawfully obtained statements made to Detective Reid.

Inspector DeLaney first spoke with the appellant at 9:00 a.m. Sunday, February 13, 1966, at the Clark County Jail. Appellant does not deny that he was fully advised of his constitutional rights by Inspector DeLaney prior to making any statement [R. T.

p. 29, lines 13-24; p. 119, lines 20-25], nor that he agreed to have his statement reduced to affidavit form [R. T. p. 30, lines 20-23]. There is similarly no dispute that appellant on the next day Monday, February 14, 1966, read and signed the affidavit after again being advised of his rights [R. T. p. 124, lines 10-18].

Appellant now contends that the affidavit was involuntarily given. However, a search of the record fails to give any support to his position. On the contrary, the last paragraph of appellant's affidavit, Government's Exhibit 4, is particularly illuminating on the issue of the appellant's state of mind. It reads as follows:

"After giving the matter much thought, I believe I committed the two post office burglaries and cashed the stolen Treasury Checks with a view to being apprehended. I feel that I have become institutionalized due to my long periods of incarceration and cannot function outside of prison. I am hopeful that if I am returned to prison I will receive some help with this problem."

Consistent with appellant's professed desire to be returned to prison for help are his admissions made nearly contemporaneously with his arrest by Detective Reid, and his subsequent affidavit to Postal Inspector DeLaney. Although the appellant denies making such a statement [R. T. p. 55, lines 5-21], it appears in the affidavit which he read and signed [R. T. p. 55, lines 23-24].

B. THERE WAS NO UNNECESSARY
 DELAY IN ARRAIGNMENT.

1. No State Magistrate Was Available
 On Sunday to Arraign Appellant.

The appellant was arrested at approximately 1:15 a. m. Sunday, February 13, 1966, by officers of the Clark County Sheriff's Department, Las Vegas, Nevada, on the basis of a signed crime report prepared several hours previously [R. T. p. 101, line 25; p. 102, lines 1-3]. Thereafter, between 1:15 a. m., and his arrival at the Clark County Jail at 1:32 a. m., the appellant made admissions with respect to one of the Post Office burglaries set forth in Count Two of the Indictment [R. T. p. 18, lines 4-16]. Upon arrival at the Clark County Jail the appellant was immediately booked on a violation of state law [R. T. p. 104, line 17]. Commencing at 2:10 a. m. and terminating some 30 minutes later, the appellant repeated his statement to a stenographer [R. T. p. 114, line 2].

Detective Reid testified that no state prisoner would have been brought before a Magistrate in the State of Nevada on a Sunday. Reid stated that a person arrested for a crime must be brought before a Magistrate in a reasonable time " . . . no more than when the next court session is held or normally in session" [R. T. p. 115, lines 15-16]. Reid concluded by stating that in the instant case the appellant would have been brought into Court "according to the work-load, Monday or Tuesday" [R. T. p. 116, line 7].

Thus, no admissions made by the appellant to State Officials were incident to or caused by an unnecessary delay in arraignment as no Magistrate was available earlier than Monday. Further, it should be noted that the appellant's first admissions to Detective Reid were made so nearly spontaneously with his arrest that the issue of whether or not there was a delay in bringing the appellant before a Magistrate would be of no significance under the instant facts.

2. Interrogation By Federal Agents:

Nearly eight hours later, at approximately 9:00 a.m. on Sunday, February 13, 1966, the appellant was interviewed by Postal Inspector Donald DeLaney at the Clark County Jail. The appellant was at that time still in custody of the State authorities.

It is well settled that in the absence of a "working Agreement", whereby the state officials were acting at the behest of, or as agents of the federal authorities, the statements made to Inspector DeLaney were properly admissible and are not objectionable under the Mallory-McNabb rationale. Westover v. United States (C. A. 9, 1965), 342 F.2d 684, 686 (Reversed on other grounds, 384 U.S. 436, dissent at page 525, 1960); United States Coppola (C. A. 2, 1960), 281 F.2d 340, 342; Watts v. United States (C. A. 9, 1960), 273 F.2d 10, 12. In the instant case the appellant was arrested on the basis of a state forgery crime report. The federal agents were not responsible for the detention of

appellant by the state authorities; nor can any argument be proffered to substantiate that at the time of the appellant's arrest by the State of Nevada Detective Reid was acting for or as agent of the federal officials or for the sole purpose of enabling federal officials to pursue their investigation. United States v. Coppola, supra, at 344; Anderson v. United States, 273 U.S. 28, 33.

3. There Was No Delay In Arraignment By Federal Officers.

The U. S. Postal Inspectors had no authority to have the appellant arraigned at any earlier time than the facts indicated occurred herein.

The appellant was arrested in Las Vegas on Sunday and made admissions as to a federal violation occurring in the Southern District of California. The earliest possible time to obtain a Commissioner's complaint from the Southern District of California was Monday morning. As the record reflects, Inspector DeLaney called the Postal Inspectors in Los Angeles, California, on Monday morning and related to them the facts of the case. Shortly after lunch Inspector DeLaney was informed by Los Angeles that a complaint had been filed in the Southern District of California, charging a violation of Title 18 U.S.C. 2115. Thereafter, the U. S. Commissioner in Las Vegas, Nevada, was immediately contacted by Inspector DeLaney and an appointment was made to arraign the appellant at the Clark County Jail [R. T. p. 32, lines 15-25; p. 33,

lines 1-20; p. 22, lines 22-23].

Assuming, arguendo, that, at best, the appellant might have been arraigned several hours earlier on Monday, February 14, 1966, it is not conceivable that any delay in taking him before the U. S. Commissioner on Monday after he had made his admissions at 9:50 a.m. on the preceding day could have had any bearing upon the voluntary character of such statements.

United States v. Mitchell, 322 U.S. 65 (1944);

Holt v. United States (C. A. 8, 1960),

280 F.2d 273, 274.

C. NO SEARCH WAS CONDUCTED.

Appellant contends that the Las Vegas police officers conducted a search of his motel room prior to placing him under arrest at 1:15 a.m. on February 13, 1966. Appellant's testimony is in direct conflict with that of Detective Reid who states that the appellant voluntarily produced a California Driver's license and a check [Government's Exhibit #2]. On direct testimony Detective Reid stated:

"Q. After he came to the door what did you do then again?

"A. We identified ourselves as police officers and asked the subject to produce identification.

"Q. Did the defendant produce identification?

"A. Yes, he produced a California Driver's license in the name of John Roy Griffin." [R. T. p. 13, lines 15-20].

Detective Reid further testified:

"Q. When he presented this (the California Driver's license) at your request what, if any, conversation did you have with him?

"A. Well, then I asked him if he had been to the various places on the strip area, on the Las Vegas Boulevard in the County of Clark, attempting to cash a large tax refund Treasury check, to which he stated, 'Yes'. And at this time he produced a Treasury check." [R. T. p. 15, lines 3-10].

The appellant denied that he had produced the driver's license or the Treasury check for the police [R. T. p. 40, lines 8-13]. It is interesting to note that defense counsel did not object to the driver's license being introduced into evidence although, according to appellant, this was also allegedly illegally seized by the police [R. T. p. 133, lines 3-9].

In essence, appellant is challenging the trial court's appraisal of the credibility of the witnesses implicit in its finding that no illegal search was conducted [R. T. p. 60, lines 6-25]. It is well settled that no such challenge is permissible in the Appellate Court.

As stated in Nuelsen v. Sorensen (C. A. 9, 1961), 293 F.2d

459 at 460:

"In so evaluating the evidence the trial Court's appraisal of the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the Appellate Court. Appellant's attack upon the credibility of witnesses whose testimony was apparently accepted by the Court will therefore be disregarded."

See also:

United States v. Orlando Fernandez-Delgado
(C. A. 9, Oct. 27, 1966, No. 20,647).

The appellant did not limit the issue of voluntariness and the alleged search to the motion to suppress. In cross-examination of appellees' witnesses he raised for the jury's consideration the same issues. Nearly half of appellant's counsel's closing argument to the jury was devoted to the question of the voluntary nature of appellant's statements and implicitly the alleged search [R. T. p. 149, lines 18-25; p. 150, lines 1-25; p. 151, lines 1-25; p. 152, lines 23-25]. In addition, the Court instructed the jury on the question of confessions, admissions, voluntariness, and the weight to be given such statements [R. T. p. 161, lines 11-25].

Thus, the question of fact as to whether or not a search was conducted was ruled on first by the Court and thereafter by the jury in the course of its deliberation. Ordinarily, where there is a dispute as to fact which must be resolved from the conflicting testimony of witnesses, the findings of the trial judge or jury who

had the opportunity to observe the demeanor of the testifying witnesses and to judge their credibility are conclusive upon appeal unless clearly erroneous. As reflected above, the findings in this case are clearly supported by the record.

Bloom v. United States (C. A. 9, 1959),

272 F. 2d 215, 223;

Overman v. Loesser (C. A. 9, 1953),

205 F. 2d 521, 522.

V

CONCLUSION

The appellant's statements were voluntarily made. The threshold statement of his complicity in the offense made at the time of his arrest, his subsequent cooperation in repeating his statement to state authorities in the presence of a stenographer and later to Postal Inspector DeLaney, as well as the revealing admissions as to his desire to be returned to an institution from which he had been released only five days earlier all bolster the voluntary nature of his remarks.

There was no unnecessary delay in arraigning the appellant by state authorities. No Magistrate was available earlier than Monday. Similarly, the federal officials had no authority to arraign the appellant earlier than the facts herein reflect occurred.

There is nothing in the record to support appellant's contention of the use of physical abuse or of an illegal search.

Therefore, the judgment should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

ROBERT L. BROSIO,
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ROBERT M. TALCOTT,
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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT

✓ See Vol 3393

No. 21,252

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM F. SCANLAN,

Appellant,

VS.

ANHEUSER-BUSCH, INC.,

a corporation, et al.,

Appellees.

**APPELLANT'S PETITION FOR A REHEARING
AND REQUEST FOR A HEARING IN BANC**

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San Francisco, California 94105,

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FILED

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INTRODUCTION AND REFERENCES

Appellant is in receipt of the proposed opinion of the Court in this cause and respectfully petitions for a rehearing and for a hearing *in banc* upon the rehearing herein sought. References herein are as set forth in appellant's briefs to appellee's brief as RB, and, to the proposed opinion, as paginated in the official advance opinion, and, unless otherwise indicated, emphasis, insertions, and omissions in quotations herein are supplied by counsel.

I.

THE PROPOSED OPINION DOES NOT FOLLOW THE RULES OF DECISION OF THE COURT IN REVIEW OF MOTIONS FOR DIRECTED VERDICT.

Appellant respectfully submits that the Court has erroneously disregarded the principles heretofore announced by the Court in respect to the appellate review of orders granting motions for directed verdict.

Appellant particularly advanced the reservations of Rules 38 (a) and 50, Rules of Civil Procedure, protecting the right to trial by jury and (Rule 50) requiring that motions for directed verdict shall state the specific grounds therefor.

Appellant respectfully requests reconsideration of this omission to assimilate the rules of civil procedure and integrated rule of decision to this point on the instant record and further submits that the absence of such statement of grounds was prejudicial in that it deprived appellant of the opportunity to advance and augment the record below.

Secondly, appellant respectfully submits that the Court necessarily fails to apply the principles applicable to review of directed verdicts announced by the Court, itself, in the well considered case of *Case-Swayne Co. v. Sun-kist Growers, Inc.*, 369 F.2d 449, 452, analyzed and quoted

in appellant's opening brief (AOB 19) affirmed (..... U.S.; 19 Led.2d 621, 626; 88 S.Ct.) in these respects.

As this defect in the proceedings below is adequately documented in appellant's opening brief (AOB 19-23, to which no response is made in appellees' brief) and is fortified by the declination of appellee to seek to rehabilitate the ruling of the trial court (as pointed out in appellant's closing brief, ACB 3-6, 17), it is respectfully submitted that it stands conceded by appellees that a lawful motion for directed verdict was not *sub judice* below, at any time.

In this connection, it should be noted that of the *two judges presiding in the trial court, one ruling on summary judgment upon depositions* of the same content as the reporter's transcript herein, *and the other ruling on the purported motion for directed verdict, reached directly opposed conclusions upon the evidence* related to crucial issues of fact in the cause. See Memorandum and Order on summary judgment (CT 343-347, particularly at 345 and 346).

There is no word in this record to suggest that appellant ever "refused" to purchase Busch Bavarian beer and it is a stipulated fact (pretrial order, paragraph 9, CT 426:6-9) that "defendant *Anheuser-Busch informed plaintiff that it would no longer sell . . . beer to him for resale . . .*" (CT 426:6-9).

Further, the rulings above quoted are contrary to all the direct evidence in the record (see references given in AOB at pages 64 et seq. and appendices 1-4 hereto).

Appellant testified further to this point (RT 214:23-26; 215:22-216:4; 226:13-24; and 229:7-10, 19-23), in part:

"*They told me that they wanted a separate operation*¹ then with only Anheuser-Busch products on the

¹Representatives of Anheuser-Busch and of Theo H. Hamm had meetings, during the former's meetings with distributors in February of 1963, and developed an agreement among them to divide

trucks and *nothing under that roof but their products.*”

* * * * *

“A. I told him, ‘George, *I don’t want to give up the line and you know that I don’t want to give up the line. This is your move and you’re the one that is setting the date. You pick the time. It isn’t my time to pick.*’ ”

Since the other rulings contained in the proposed opinion are necessarily based upon the false assumption that appellant, either himself terminated the relationship, or sought to impose wrongful conditions upon its continuance, it is respectfully submitted that reconsideration of the proposed rulings is necessary to the proper review of the order taking this case from the jury and that a rehearing should be granted for this purpose, in all events.

II.

APPELLANT MADE A FULL CASE ON HIS CONTRACT CLAIM AND THE LETTER-POSTSCRIPT WAS EXPRESSLY RESTRICTED TO THE DEFENSE AND LIMITED TO MATTERS OF “CREDIBILITY”, FOR JURY RESOLUTION.

Appellant respectfully submits that it can only be fairly put dogmatically that the testimony in this trial would be found sufficient, if submitted in support of a verdict upon plaintiff’s second cause of action, breach of contract (see quotation and references, AOB 24-48). The decision of this Court in *Kelly-Springfield Tire Co. v. Bobo*, 4 F.2d 71, would appear to require such a holding. Similarly, the California courts would be required to follow *Burgermeister Brewing Corp. v. Bowman*, 227 C.A. 2d 274; 38 Cal.Rptr. 597, (hearing denied).

Appellant must, therefore, respectfully urge that the statement in the proposed opinion (page 2) that “there

territories and distributors between the two breweries. See abstracts of testimony of Flanigan and of appellant appended hereto as **Appendices 1 and 2.**

was no evidence of such a contract" is simply insupportable. (Please see the abstracts and references to the record set forth in appellant's opening brief, pages 24-48.)

Further, appellant respectfully takes the liberty of suggesting that the actual rationale of the Court (page 2) is that the admitted negotiations, the conceded consensus and appellant's actual performance of all undertakings and conditions, as agreed upon and accepted by both parties, *prior* to the receipt of the letter-postscript released, or otherwise supplanted, the negotiated agreement.²

That all this could proceed upon the understanding, or assumption, that appellant would receive one load of beer, or might never receive any at all—or having received one load, but might never receive another—inevitably assumes an unthinkable mental deficiency on appellant's part. Certainly, and assuming *arguendo*, that the letter-postscript "was anything at all", it was matter for the jury to resolve whether appellant had, in fact, knowingly proceeded in the mindless manner suggested.

All this occurred in California and it is statutory, as well as decisional, law that "*A voluntary acceptance of the benefit of a transaction is a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.*" (Civ. Code, Sec. 1589.)

See *Durgin v. Kaplan*, 68 A.C. 79, 88, 89, decided January 23, 1968; *Calif. State Automobile etc. Bureau v. Barrett Garages, Inc.*, 257 A.C.A. 84 (December 18, 1967) at pages 88, 89, 90, 91, 92.

In *Anheuser-Busch, Inc. v. Jefferson Distributing Co.*, 353 F.2d 956 (5th Circuit), (cited page 2), *there is no*

²The two "prior" letters merely state that the purchase of the Barossos' beer business was not to be deemed to include the purchase of any of the "good will" of Anheuser-Busch. The order-to-order letter of September 26, 1961, arrived *after* appellant had fully performed every act and accomplished every condition *negotiated* at the Eden Motor Lodge with *Elliott*, Leadholm and Fred Barosso.

suggestion that that distributor ever had a negotiated agreement, or any negotiations whatever, with the brewery and was, therefore, simply a job-lot buyer.³ In *Rohem Distributing Company v. Burgermeister Brewing Corporation* (196 Cal.App.2d 678, similarly cited by the Court, page 2), it was expressly stated in the written agreement that it supplanted "the prior existence of the oral contract" (*Burgermeister Brewing Corporation v. Bowman*, 227 Cal.App.2d 274, 38 Cal.Rptr. 597).

As in *Simpson v. Union Oil Company*, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051, the "clever draftsmanship" of the brewery's attorneys must give way before the law.

Nothing in the record related to the letter postscripts can be considered as a judicial admission (compare *Fleischmann Distilling Co. v. Maier Brewing Corp.*, 314 F.2d 149, 158-159) and, moreover, at appellant's insistence, the trial court made a definitive ruling during pre-trial conference, binding upon *both* parties to this action, that these letter-postscripts could *only be used in the defense of appellee brewery*. See the ruling of the trial court in pretrial conference (RT 38:11-15).

The proper resolution of the effect, if any, of the letters calls for the application of the ruling of the Court in its most recent decision upon an indistinguishable situation in *Standard Oil Co. of California v. Perkins*, 347 F.2d 379, 383, 384 (1965), wherein the Court affirmed judgment on the verdict of the jury, awarding recovery upon the breach of an earlier agreement between the parties, notwithstanding the subsequent execution of an "adhesion"—but complete and valid—contract.

If a plaintiff's verdict was required to be affirmed in *Standard Oil*, no good cause could be marshalled to with-

³Herein there was *no* written notice of termination! Hence—if the letter-postscript were *the* agreement—it was breached and repudiated, in all events.

hold submission of this appellant's contract claim from this jury.

III.

THE CONSPIRATORIAL AND TORTIOUS INTERFERENCE COUNT IS PROVED.

The only "defect" in proof on this cause of action is stated by the Court (pages 2-3) as follows:

"Appellee's first contact with Barosso was initiated by Barosso himself. He had been *serving* the territory for distributors of Anheuser-Busch products *for over 20 years*. He had not sold *his*⁴ business or goodwill to appellant (only certain business assets), and had not made any covenant not to compete."

The conduct proved (quotation and references, AOB 48-54) is unfair competition—by definition—under California common law (see cases cited, AOB 54-60). The reference to the "first contact"—after 20 years dealing with appellee brewery—is adequately answered in *Bancroft-Whitney Co. v. Glen*, 64 C.2d 327, 345, 49 Cal.Rptr. 825, 411 P.2d 921 as follows:

"We hold, for the reasons hereinafter stated, that the evidence shows as a matter of law that Glen violated his duties to plaintiff and that the other defendants, having cooperated in and reaped the fruits of his violation, are guilty of unfair competition."

Reconsideration of this ruling is necessary to a just disposition of this cause, and should be afforded this appellant.

⁴Literally, it is true that Fred Barosso did not sell *his* business; factually, the quoted statement is contrary to the evidence, because the Barosso partnership sold *their beer business* and the *partners ceased* business, altogether, and *both* became full time employees (as did key employees of the partnership) of appellant in *his* beer business.

IV.

**THE ANTITRUST CLAIMS ARE FULLY SUPPORTED AND
SHOULD BE SUBMITTED TO A JURY.**

As noted in part I hereof, the Court appears to have proceeded upon the erroneous assumption that appellant refused to deal with appellee brewery—contrary to the stipulated and admitted facts—and (by reference to *Ace*,⁵ 318 F.2d 283) to have assumed that the admitted conspiratorial conduct established by such facts is somehow benign, as not affecting competition.

The “one merchant” concept can have no relevance in private enforcement of the antitrust laws—inasmuch as (absent an atypical class action) the private action plaintiff must always be “one merchant”. It would seem, further, that the Supreme Court has authoritatively eliminated the “one merchant” concept from private enforcement of the antitrust laws in its trail-blazing decision in *Klor’s, Inc. v. Broadway-Hale Stores*, 358 U.S. 809, 3 L.ed.2d 54, 79 S.Ct. 23, and reiterated and applied—with full vigor—in *Simpson v. Union Oil Company of California*, 377 U.S. 13, 12 L.ed.2d 98.

Since the Court has indicated that it would otherwise have followed *Walker*, *Girardi*, *Klor’s*, *Simpson* and similar rulings and it is shown that every element necessary to invoke such rules of decision is here proved (appellant’s opening brief 60-81 and appendices 1-4 hereto), it is submitted that reconsideration of the antitrust claims is required.

⁵It is noted that *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, (ACB 15, 18, 20) dealt with a judgment on the pleadings in which there was no allegation that the tortious conduct affected competition in interstate commerce! Compare *Speegle v. Board of Fire Underwriters*, 29 C.2d 34 and *Kold Kist v. Amalgamated Meat Cutters*, 99 C.A.2d 191, relating to the first cause of action, and *Crane Distributing Co. v. Glenmore Distributors*, 267 F.2d 343 (6th Circuit) on the fourth cause of action (all cited AOB 63-81 and ACB 20 herein).

It is demonstrated that appellant established—not only the conspiracy to refuse to lawfully deal with him to his injury—but that this conduct was purposed, effective and carried out pursuant to the *Walker*-type conspiracy to (1) exclude other “popular priced beers” from the business of Anheuser-Busch distributors, and (2) to tie-in sales of Busch Bavarian to Budweiser and Michelob beers. Compare the decision of this Court in *Jerrold Electronics Corp. v. West Coast Broadcasting Co.* (341 Feb. 652, 661-665.) Nothing more was established in *United States v. Jos. Schlitz*, 253 F.Supp. 129, 149, affirmed U.S. 17 L.ed.2d 35, 87 S.Ct., in the same industry, in the same places and during the same period of time.

The ruling therein was, in part:

“... it is clear that *Schlitz* could and did ‘force’ its full line of products into some outlets and take its products away from other outlets. In either case, the wholesalers involved become less effective distributors for the products of other brewers. Thus, ... had and would continue to have serious anti-competitive consequences at the important wholesale level in the beer industry.’”

Schlitz only considered 31 distributor changes of this nature whereas it is expressly admitted (by answers to interrogatories) that appellee brewery had already required 14, of 34, of its existing distributors to “drop” a competitor’s brand to take on Busch Bavarian beer.

Such tie-in sales are uniformly prescribed as per se violations of the antitrust laws. See, in relation to sales of alcoholic beverages, *Black v. Magnolia* (365 U.S. 24, 25, 2 L.ed.2d 5, 7, 106 S.Ct. 106) namely: “*Tying agreements by which the sale of one commodity is conditioned on the purchase of another have been repeatedly condemned under the antitrust laws, since they serve no purpose beyond the suppression of competition.*”

Simpson, supra, 377 U.S. 13, teaches that a manufacturer and its distributors compose an unlawful conspiracy,

or combination, for all purposes of a private action, particularly when the distributors are "laced in" by such devices as the order-to-order letter postscript device herein to prevent the exercise of their independent judgment as independent purchasers of merchandise.

On the California antitrust claim the rulings in the cases of *Speegle v. Board of Fire Underwriters*, *supra*, 29 Cal.2d 34 and *Kold Kist v. Amalgamated Meat Cutters*, *supra*, 99 C.A.2d 192, require submission of this evidence to a jury (summary, Appellant's Opening Brief 60-81, Appellant's Closing Brief 14-23 and appendices 1-4 hereto).

The California statute (section 16720 of the Business and Professions Code) specifically proscribes restraints and restrictions "to prevent competition in the purchase of merchandise" and further proscribes (16727) any sale on the "understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller" and it is the California rule of decision that "*the statute . . . makes no exception in favor of contract only in partial restraint of trade*" (*Chamberlain v. Augustine*, 172 Cal. 285, 288; see, also, *Morey v. Paladini*, 187 Cal. 738).

The "defensive" claim (being defensive was not reached below) of pretended "necessity" has been laid to rest in each ruling of the Supreme Court (e.g., *United States v. General Motors Corporation, et al.*, 384 U.S. 127, 16 L.ed.2d 415, 86 S.Ct. 1321, and cases cited, and compare the testimony abstracted in appendices 1-4 hereto).

The sober fact is that each element of this subject matter is factual and presents a jury issue—not to be disposed of by categorical imperatives in mid-trial as the instant order and judgment would do. These considerations deserve reexamination and a rehearing should be granted to permit it.

V.

A HEARING IN BANC SHOULD BE GRANTED IN VIEW OF THE FAILURE OF THE PROPOSED OPINION TO NOTICE LEADING AND APPLICABLE DECISIONS IN THIS CIRCUIT AND OF THE SUPREME COURT.

Since it is believed only fair to state that the proposed opinion does not refer to, nor seek to implement, the rules the decision announced in other decisions of the Court, a hearing in banc should be granted herein.

Appellant particularly calls attention to decisions of the Court in the following categories as in conflict with the proposed opinion herein, namely: (1) the rule of decision relating to the standards of review of the record on motions for direction of a verdict and Rule 50 in respect to the requirement of statement of grounds for the motion, as in *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449; (2) the case of *Kelly-Springfield Tire Co. v. Bobo*, 4 F.2d 71 in respect to the substantive contract rights established by the instant record; (3) the rule of interpretation applicable to the letter-postscript of appellee as declared in *Standard Oil Co. v. Perkins*, 347 F.2d 379, and (4) the rule of decision related to antitrust conspirators among manufacturers and distributors in restraint of trade announced by the Court in *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1; *Girardi v. Gates Rubber, etc., Inc.*, 325 F.2d 744, and *Jerrold Electronics v. West Coast Broadcasting*, 341 F.2d 341; among manufacturers and distributors in restraint of trade; and the declination of the proposed opinion to notice as to apply the rules of decision announced by the Supreme Court in the cases of *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 3 L.ed.2d 741, 79 S.Ct. 705; *Simpson v. Union Oil Company of California*, 377 U.S. 13, 12 L.ed.2d 98, 84 S.Ct. 1051; *United States v. Jos. Schlitz Brewing Company* (U.S.D.C. N.C. Cal. S.D.) 253 F.Supp. 129 (March 24, 1966) aff'd U.S. 17 L.ed.2d 35, S.Ct., and *General Motors Corporation v. United States*, 384 U.S. 127, 86 S.Ct. 1321, arising in the circuit.

Secondly, the California statutes and decisional law are not noticed in respect to the three state claims, including parallel decisions reported since the submission herein (see part II hereof, *supra*).

Thirdly, the trial court did not obtain jurisdiction of the cause—except the fourth cause of action—because defendants Flanigan, Elliott, et al., are natural persons and California residents, as is appellant, and appellant timely moved to remand after removal of the cause from the state court.

It is respectfully submitted that a rehearing should be granted and, upon rehearing, a hearing in banc should be ordered to conform material rulings in the cause to applicable precedents in this circuit.

Dated, San Francisco, California,
February 9, 1968.

Respectfully submitted,
J. ALBERT HUTCHINSON,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and that said Petition in my judgment is well founded and not interposed for the purpose of delay.

J. ALBERT HUTCHINSON,
*Attorney for Appellant
and Petitioner.*

(Appendices Follow)

Appendices.

Appendix I

ABSTRACTS OF TESTIMONY OF JOHN FLANIGAN (RT 1023-1031).

“Mr. Hutchinson: I think I should read the first one which appears at page 22, your Honor, because this occurred at the meeting with Mr. Scanlan *on the 8th*, as we understand it, of *February, 1963*.

‘Q. Now, with respect to Hamm’s in the discussion of Hamm’s with Mr. Scanlan, *did he not ask you if you had on behalf of Anheuser-Busch discussed any of these rearrangements with the representatives of Hamm’s?*

A. He did ask us that.

Q. Do you recall your reply?

A. I don’t recall the reply exactly, but we had no definitive answer from Hamm’s.’

I think that implies that they had discussed it certainly.

Then on page 29—I think this passage brings it up to the point where we are considering—page 29.

‘Q. Was Mr. Scanlan as a result of this meeting of February to make any decision on that at the request of the brewery, namely, to give up or continue with Budweiser and Michelob?

A. No. *The meeting in February occurred right after Hamm’s officials had been to California and had fairly well stated their position, which was in opposition to a position that they took down south with Ace Beverage, and I felt that although Mr. Fiege had been quite harsh on one of the Hamm’s wholesalers while he was here, and this was general knowledge at the convention, I felt that Scanlan’s picture was somewhat different, because of the territory, the problems of the territory, and that Mr. Fiege when he got back*

to St. Paul would relent in this particular case and perhaps would let Bill work this out as we had discussed. I might point out that Mr. Elliott didn't share my opinion of Mr. Fiege's generosity.

Q. Did Mr. Fiege make whatever statements you are referring to to you?

A. No.

Q. Were they recorded or reported in public prints?

A. No.

Q. Could you tell us the source of information as to what Mr. Fiege had said on the subject?

A. Walter Markstien.

Q. Markstien?

A. Yes. He was the wholesaler to whom he made them.

Q. *He is presently a distributor for this brewery, Anheuser-Busch?*

A. Yes, in San Francisco.

Q. And he was a year or two prior——

A. *He was a distributor for Hamm's and Budweiser for a number of years prior to that.*

Q. *When the Busch Bavarian situation developed, he ceased to be a distributor for Hamm's; is that right?*

A. *As a fact, yes.* When Busch Bavarian came into the market, he no longer distributed Hamm's.

Q. At the same time, you had another distributor in San Francisco; was it Rossi?

A. Rossi.

Q. And he had been distributing Anheuser-Busch products and what else?

A. Hamm's.

Q. *And as a result of Busch Bavarian, Rossi was terminated as Distributor to Anheuser-Busch products?*

A. *He was.*

Q. *And Markstien then took over the whole city?*

A. *The entire San Francisco City.*

Q. Now, with respect to Rossi, how did the termination of his relations with Anheuser-Busch come about?

A. Well, when it became evident that Markstein was no longer going to be able to keep Hamm's, and since Rossi was an outgrowth of our original arrangements with Hamm's for distribution in San Francisco, we recognized that the Rossi area would have to be incorporated into the total San Francisco area, and we therefore did not offer or suggest to Rossi that he take on Busch Bavarian. We told him what we were going to do out of courtesy. But we knew ahead of time that we would have to incorporate the entire matter to make it a reasonably economic situation.

Q. Was Rossi ever given a written notice of termination?

Mr. Hanger: A written notice of *determination*.

Mr. Hutchinson: Excuse me.

Q. Was Rossi ever given a written notice of termination?

A. I don't know.

Q. Now, you said that you had an arrangement with Markstien and Rossi and Hamm's regarding distribution of Hamm's and Anheuser-Busch products. Do I understand that you had some arrangement with Hamm's at an earlier time on the subject?

A. Hamm's and ourselves handled this as a brewery branch of the City of San Francisco originally, with the exception of the Rossi territory, which Hamm's was servicing through Rossi. We were both anxious to discontinue our branches and felt we could

—with the dual volume be of interest to the wholesaler.

Q. *Prior to the Busch Bavarian situation, you had had meetings with Hamm's and discussed this business of distributors' territories and the like?*

A. Some years before this.

Q. Did you personally participate in these meetings or discussions?

A. In some of them.

Q. With whom did you talk on behalf of Hamm's?

A. I talked to Herm Newhouse, to Herschback, and, I don't think we talked to—no, I guess we talked to Herb Goodwin from time to time.

Q. Can you give us the approximate date of the first of these meetings?

A. Not off hand.

Q. Can you give us the year?

A. I can't even give you that specifically. It preceded the time that Markstien entered the market and it is a matter of record somewhere.

Q. Before 1961?

A. To be honest with you, my memory is cloudy on the date that we changed from a branch—it seems to me it was before that.

Q. And that would have been then when you changed from the branch operation. What date was that?

A. If I knew that date, I could give you a general idea of when the other was.

Mr. Scanlan: I can refresh you. It was before the strike and the strike was in 1958.

The Witness: It was pretty far back and I just can't remember the date. But we can find that.

Q. (By Mr. Hutchinson) Some time then earlier than 1960?

A. I would think so.

Q. Now, by "Brewery branch", I take it you mean that you kept a warehouse or some supply here in some fashion to supply other distributors than Markstein and Rossi; is that right?

A. No. *We operated as a wholesaler, as a—the brewery operated a distributorship as opposed to an independent distributor.*

Q. In other words, Anheuser-Busch actually had a selling operation here in San Francisco?

A. Correct.

Q. And how long did it continue?

A. Well, it continued off and on from about the time we came back into the market—it was an off-again-on-again sort of thing. We would have a wholesaler; then we would have a branch; then we would have a wholesaler, from about 1947 on.

Q. *It is your understanding, is it not, that the brewery could sell direct to retailers at any time anywhere in the State?*

A. Yes.

Q. So choosing a distributor was a matter of misjudgment rather than any restriction on the legal capacity of the brewery function?

A. Correct.'

* * *

'Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

Q. As far as you know, he is not a corporate officer?

A. As far as I know, he is not.

Q. He is no longer with Hamm's?

A. He was with Hamm's.

Q. But he is not now?

A. He is no longer with Hamm's, correct.

And then at the bottom of that page I will read one sentence.

Q. When he was working for Anheuser-Busch?——'
The Court: Read that again. That seems to be the crux. This is in the February, 1963 area.

Mr. Hutchinson: Yes. I will start re-reading at page 33, line 9, which I think is the point the Court probably has in mind.

'Q. Now, what else with regard to Hamm's? When Rossi and Markstein were to change around, as you have indicated, was there a further meeting between you and some Hamm's representative?

A. I had luncheon with Herm Newhouse to see if I could determine their feelings on the matter, since we had a number of Hamm's wholesalers, and since we were actually to—or since the wholesalers themselves were somewhat confused as to the position of Hamm's and where they were going to, what was going to happen, I was hopeful that I would be able to clear the air. This luncheon was at the Fairmont Hotel and I think about the time of the February 8th meeting.

Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

Q. As far as you know, he is not a corporate officer?

A. As far as I know, he is not.

Q. He is no longer with Hamm's?

A. He was with Hamm's.'

I think the other portions sort of carry forward the same ideas, though there may be something more specific.'

(RT 1023:14-1031:25.)

Appendix 2

ABSTRACTS OF TESTIMONY OF WILLIAM F. SCANLAN (RT 208-216, 226, 228-229).

“Q. Following the luncheon you did have a particular meeting then with Mr. Elliott and Mr. Flanigan?

A. Yes, yes, I did, at 1:00 o'clock was my scheduled time.

Q. Now, was this in an office or suite of rooms, residential rooms in the hotel?

A. It would be a suite of rooms in the Fairmont Hotel.

Q. Was anyone else present other than the two of you—the two of them and yourself?

A. No, that was all that was there.

Q. Now, omitting the pleasantries and casual remarks, would you give us, as best you recall, the discussion in so far as it related to the business of the brewery and affected you that preceded, indicating if you can, each individual who spoke and the substance of what they had to say?

A. Yes. I was brought into this room and seated and Mr. Flanigan took the floor and told me, ‘Bill, you know what this is all about and we are coming with Busch Bavarian.’ And I said, ‘Fine.’ And I sat attentively and listened. He had a chart listing all of the California breweries in their sales or their sales position as far as barrels or gallonages are concerned, showing their position or whether they was in a plus position for the previous year, for 1962, or whether they was in a down position where each brewery stood in the industry as far as California sales were concerned. He went over this quite thoroughly and pointed out all the weaknesses in some and the strength in one.

* * *

Q. Do you recall how Mr. Flanigan requested your views; do you remember how he put it?

A. Yes, he did. He made the statements, and he said, 'You can see our position that *all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. Some of these breweries are getting pretty weak and some of them won't survive.*'

* * *

Q. Now, was anything further said about your views or your activity, if any, in respect to the introduction of the Busch Bavarian brand in your territory?

A. Yes, he did. He says, 'Now, we're coming with this program and *we expect all of our wholesalers to give up something.*'

Q. This was Mr. Flanigan?

A. Yes, Mr. Flanigan.

Q. Was he more specific in any of his remarks at that time as to what the 'something to be given up' might be?

A. Well, yes. He says that 'We realize because we are a premium priced beer up till now that *we are in with every brand of beer listed on this chart or in the State of California, and coming with this we are going to upset the whole beer business because we are in with some brand in almost every wholesalership in the State of California.*'

Q. Now, in respect to the—in respect to your views as to your territory, were those requested or solicited by either of these gentlemen?

A. Well, my views, or they had some projected figures for the sale of Busch-Bavarian.

Q. In San Joaquin County?

A. Yes, for San Joaquin County.

Q. Do you recall the approximate projection, the amount in cases, or whatever other measure it might be?

A. Yes, I do. They had a projected sales figure of 88,000 cases of Busch Bavarian for that year plus a 45,000 known sales of Budweiser the previous year.

Q. Now, did they ask your views as to the likelihood of attaining that amount of sales or anything of that nature?

A. Yes. I listened to them and told them at that time that their anticipated sales or their projected sales, that there was just no way that any beer wholesaler could make a go of anything like this in the Stockton market. It was—conditions were too hard and too tough and they just didn't have enough boxes or cases slated for a wholesaler to even come close to making it.

Q. Now, in that connection, did you call to their attention or they call to yours, the sales of Hamm's or any other beer being sold in San Joaquin County?

* * *

A. I told them it was an impossible situation for me *to even consider dropping a brand of beer like Hamm's*, that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

Q. What, if anything, was said in response to that statement, if there was any, by either of the other men?

A. Yes. John replied and he said, 'Well, Bill, maybe we got our sights set too high then in this situation. As far as you dropping Hamm's maybe that would be—we couldn't expect you then to do it under these——'

Mr. Hutchinson: He's speaking to the witness.

The Court: Who was it who said that, —Flanigan?

The Witness: This would be John, yes, John talking to me.

The Court: John Flanigan. I am sorry. Go ahead.

* * *

The Witness: Yes. John told me that maybe that their analysis of it was wrong and they couldn't expect me then under those situations—they *knew that no one was going out and commit suicide, financial suicide, that way, and that they, or we better look the situation over a bit closer.*

* * *

Q. Now, did anything develop with respect to any arrangements by which *you would attempt to keep Hamm's and also take on Busch Bavarian with the Budweiser and Michelob beers that you were already handling?*

A. No. They told me at that time that they didn't expect an answer right then off me but we discussed the possibilities of different ways to do it.

Q. Now, *was anything said about having a so-called separate operation of some sort?*

A. Yes, *there was.*

* * *

Q. What, if anything, was said about how it would be handled *if it should be carried out, that is, a separate operation; were you to operate it, or what was the case?*

A. *They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.*

Q. What was said, if anything, about associating personally or your name being associated with such a separate operation if it developed?

A. Well, I mentioned the possibility that maybe I could take Fred Barosso over there and make him the manager of the operation and maintain my present facilities and just have the two warehouses side by side.

* * *

Q. What if anything, did he say?

A. He [Elliot] told me that, 'Bill, that wouldn't be a satisfactory arrangement. We have had Fred Barosso and we have had him for years and find that he is a poor

business man. He does a good sale on the bars and on the off sale accounts but he is just not capable of running the business. We couldn't go along with that at all.'

Q. Was anything said by either of them about your having to associate and associate your name with such a separate operation if it developed?

A. Yes. Then Mr. Elliot told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are, and if we build a new building or if you build a new building and our products are in there we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.*'

Q. Now, in connection with the prospects for Busch Bavarian in San Joaquin County and your part of it, what further was said at this meeting?

A. I reminded Mr. Elliott then, and he was sitting alongside of me, I went back and reminded him of the agreement that I felt was reached in the Eden Motor Lodge when he assured me that they had no plans for Busch Bavarian for California in the immediate future or the near future or the three to five years, or how it was answered.

* * *

Q. What did he state?

A. He just said, 'Bill, things have changed.' "

(RT 208:12-216:20.)

"Q. What, if anything, did Mr. Newhouse respond when you gave him this background and made this final statement?

A. Well, in one of these meetings at that time he made the statement, 'Well, Bill, would you like to get out the way that you got in?' referring to my buying, buying Barosso out.

Q. Did you respond to that?

A. I said, 'Certainly, but are you authorized to offer this?'

Q. What, if anything did he respond?

A. No, he didn't reply to that.

Q. Now, did you have any further discussion with either of these men in relation to the distribution of Anheuser-Busch products following these discussions.

A. Yes, I did. Mr. Newhouse was in the market quite frequently and he always wanted to know what my plans were. *And I told him that my plans hadn't changed a bit, that we had discussed the possibility of the building, that I had made some inquiries about this and that but ultimately I would end up and say, 'George, —' George Newhouse was the name— 'I am happy and content with the deal or arrangement that we made with Hamm's and Budweiser. Why don't yo go find someone else to carry the Busch Bavarian?'* "

(RT 226:3-24.)

"Q. Now, have you related to us, as you now recall, the principal contacts you had with all of the brewery people from the meeting at the Fairmont up until early April around the 9th?

A. Yes.

Q. Now, on April 9th or thereabouts did you receive a call from anyone connected with the brewery?

A. Yes. When I returned to my office there was a return call for me from Mr. Elliott in Van Nuys that I should call him.

* * *

Q. Now, in this call was there any discussion about the *distribution of Anheuser-Busch products?*

A. *Mr. Elliott was apologetic and told me, 'Bill, we have found another wholesaler or somebody that is going to take on the Busch Bavarian line and they want the*

whole package.' They was making arrangements to set up a distributorship and he felt real bad *but he was going to have to terminate me* or, in other words, that I had had it.

* * *

Q. Did he indicate when you would be no longer be able to distribute or buy for resale any of these products?

A. Yes. He said, 'Bill, now what is a good cutting off date for you?' Or, '*When can we cut you off?*'

* * *

Q. What did you say?

A. *I told him, 'George, I don't want to give up the line and you know that I don't want to give up the line. This is your move and you're the one that is setting the date. You pick the time. It isn't my time to pick.'* "

(RT 228:8-229:23.)

Appendix 3

ABSTRACTS OF TESTIMONY OF CHARLES OROSOLINI
(RT 542-547).

“Q. Did Mr. Newhouse make a proposal to you or request you to consider distribution of Busch Bavarian?”

A. Yes. He wanted to know whether I was interested to carry Busch Bavarian. And I listened to his sales talk and he told me about his advertising, all that. Then I finally asked him, I says, ‘Well, it’s kind of strange,’ I says, ‘that you are offering me Busch Bavarian. You have a distributor.’ He says, ‘Well, yes, that is right.’ I said, ‘Why don’t Bill take it?’ He says, ‘Well, Bill won’t give up Budweiser.’

* * *

Q. Who was identified as ‘Bill’?

A. Scanlan.

Q. What were the brands of beer that he was distributing at that time?

A. He was distributing Hamm’s and that is the beer that he was going to throw out.

Q. Now the statement made by Mr. Newhouse was that they weren’t going to give Busch Bavarian to Mr. Scanlan, or Bill, as you identified him?

A. That is right.

Q. Because he wouldn’t give up Budweiser, is that correct?

A. No, because he wouldn’t give up Hamm’s.

Q. Thank you. Now, this was the first meeting. Was there any second or later meeting with Mr. Newhouse?

A. Yes; about two or three days later Mr. George Newhouse came back and he had a representative from Budweiser.

* * *

Q. Now, did you have a conversation on the same general subject as the first one at this meeting?

A. No, the conversation that I had the second time was that he wanted to know *whether I would be willing to put in another barn, and in that way, then, I could have the three products of Budweiser.*"

(RT 542:7-543:24.)

* * *

"Q. Now, was there any suggestion that there might be a separate operation of any kind? Was that ever discussed?

A. That was the discussion that we had, that *they wanted me to set up another barn, a separate organization.*"

* * *

"By Mr. Hanger:

* * *

Q. So your conclusion, if it was a conclusion, that you couldn't take on Anheuser-Busch was based on the fact that the Schlitz people had asked you to give up Regal, is that right?

A. *No. I wasn't interested in Budweiser, period.*

Q. The first call that was made on you by Mr. Newhouse he indicated that he was representing only Busch Bavarian?

A. *Busch Bavarian, that's right.*

Q. And the first discussion he had with you about taking on this competitive brand dealt with Busch Bavarian?

A. That is right."

(RT 546:2-547:23.)

Appendix 4

ABSTRACTS OF TESTIMONY OF PETE GIAHOS

(RT 442, 446, 458, 467, 532, 537, 538).

“Q. Perhaps I can state it a little more simply:

In connection with the discussion of the Busch Bavarian merchandising program did either Mr. Flanigan or Mr. Elliott or perhaps someone else present point out to you the relative standing in sales of Lucky Lager, Hamm’s and other beers?

Mr. Hutchinson: Q. Do you have the question now?

A. Yes.

Q. Now, at that time were you distributing any beer other than the Anheuser-Busch products, Budweiser and Michelob?

A. Yes.

Mr. Hutchinson: Q. What brands were you distributing?

A. We were handling Budweiser, Michelob, Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali.

Q. Now, other than the Budweiser and Michelob brands, those were manufactured and sold by breweries other than Anheuser-Busch, is that right?

A. Yes.”

(RT 442:16-443:1.)

“Q. And if I understand then, Mr. George Newhouse was taking over the territory for them in lieu of Mr. Leadholm; is that correct?

A. I believe that is correct.

Q. Now, will you tell us, as best you remember, what you said and *what Mr. George Newhouse said to you in respect to changes, if any, that would occur or should occur in your distribution of various beers upon the advent of the Busch Bavarian beer distribution?*

Mr. Hanger: Same objection for the record.

The Witness: Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*

By Mr. Hutchison:

Q. Did he indicate *what competitive brand was to be dropped?*

* * *

A. *Falstaff.*

Q. Was that a beer commonly referred to in the trade as a popular priced beer?

A. Yes, sir.

Q. And was that about all that Mr. Newhouse said at that time or was there something further?

A. Well, actually he was very new with the company at this point, and I think it was very embarrassing to him, and I kept telling him that it was also very embarrassing to me, but that I felt that *I would like to keep my distributing company intact physically and I realized that he, being new with the Anheuser-Busch Company, that he was apparently attempting to convey to me what his company wanted or expected in our marketing area.*"

(RT 446:6-447:15.)

"The Court: Well, Mr. Hanger, let me ask you a question. You don't have to commit yourself on this. But is there any dispute that, first of all, the Bud people said to Scanlan, 'We want you to handle Busch,' and further that because he did not handle Busch they took Bud away from him? *These are admitted facts, aren't they?*

Mr. Hanger: *Well, they took Bud away from him not specifically because he didn't handle Busch but for other reasons they couldn't find anybody else to handle it. I think that is an admitted fact.*

The Court: Wait a minute. I missed you on that. *I asked you whether they took Bud away from Scanlan because he evidently never got around to giving them an answer as to whether he was going to handle Busch.*

Mr. Hanger: I think they took——

The Court: That is the way I interpret the evidence that has come in so far from him.

Mr. Hanger: *That's right*, they took Bud away from him. Now, I think they would have left Bud with Scanlan if they could have found another suitable distributor for Busch in the San Joaquin County. I think the evidence will reflect, and I think that it has already been testified to by Scanlan, that George Newhouse came to him and asked him who else would take it and he went and talked to all those people.

The Court: Let's concede that—I see your point. *There is certainly testimony to that effect on which a jury could reach that conclusion that they took Bud away from him because they wanted to be sure that they'd get a Busch distributor in San Joaquin County; he hadn't made up his mind as to whether he wanted to handle Busch; they couldn't get anybody else to handle Busch, and evidently the only way they could get anybody to handle Busch was to tie it in with Bud.*

Mr. Hanger: Right. I don't like to use that expression 'Tie it in' but I think——

The Court: That was an unfortunate statement of mine in the presence of Antitrust lawyers. O.K. That they wanted to have the three of them sold together.

Mr. Hanger: The new distributor insisted on taking Bud and Michelob before he'd take Busch, and Mr. Scanlan's own testimony was that he didn't feel you could take that combination of three beers and make a profit of them, which is why he refused to take on Busch.

Mr. Hutchinson: *He wanted to handle them without restrictions. He didn't refuse to take it but——*"

(RT 458:6-459:24.)

"The Court: . . .

So maybe, Mr. Hutchinson, if you could prove a conspiracy in which Anheuser-Busch was involved, along with some other distributors, Dinubilo, we will say that they were going to make Mr. Giahos give up the sale of Falstaff beer and thus diminish or restrain competition that would otherwise be offered by Falstaff beer, then, if I read this portion of the Walker case correctly, if I understand it, *that would constitute a statement of a cause of claim and if it would be proved it would be a violation under Section 1 of the Sherman Act.*

Do you agree with that, Mr. Hanger?

Mr. Hanger: *I agree that if the brewery conspires with other distributors, say, in different territories, in different areas, ——*

The Court: All right.

Mr. Hanger: ——*To take a particular brand away from another distributor, under Walker the Court says they believe that may constitute a violation of the Sherman Act."*

(RT 467:7-24.)

"By Mr. Hanger:

Q. Mr. Giahos, you said you met with Mr. Flanigan and Mr. Elliott on February 8th or 7th, I believe, is that correct

A. That is correct.

Q. Now, at that time, as you indicated on your direct examination, you had some five or six additional brands other than the Budweiser brand, correct?

A. That is correct.

Q. Including Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali, correct?

A. That is correct.

Q. Now, at the February 7th meeting had you been asked to bring your total Falstaff sales for the preceding year?

A. Yes.

* * *

Q. So that at the time of that presentation it was indicated to you on the basis of the projection that *if you substituted Busch Bavarian for Falstaff* you would, in fact, have more sales, is that not true?

A. That was the inference."

(RT 532:14-533:23.)

"Q. I take it then you did not independently determine, as a matter of business judgment, that Busch Bavarian was going to be better than Falstaff immediately?

A. It is very difficult to project that.

Q. *As a matter of fact, you urged, did you not, to both Mr. Elliott and Mr. Newhouse that you be permitted, if you had to give up something, to give up a brand in which you had a smaller sales, including particularly Regal, is that not true?*

A. I was willing at that time to give up a couple of lesser selling items. I don't think Regal was one of them because it wasn't a lesser selling item.

Q. At least lesser quantity?

A. Well, particular reference to items like Mexicali, Bulldog, and the Rainier.

Q. Now, I think you stated in answer to a question by Mr. Hanger that after the Falstaff product was no longer distributed by you, it lost ground in the market, lost its sales, is that true?

A. That is correct."

(RT 537:3-22.)

* * *

“Q. I see. Now, Mr. Flanigan did finally tell you that Anheuser-Busch would not raise objection if you took on Falstaff line again, is that true?

A. *I was permitted to do business with Falstaff again.*

Q. Now, you have had that line merely a year. Is that long enough to give an estimate as to the present annual sales of Falstaff in your territory?

A. *The present Falstaff sales are less than half of what they were when we gave it up.*

Q. Now, have you been, since you took back the Falstaff line for distribution, carrying out the usual distributor functions to the best of your firm's capacity?

A. In regard to——

Q. Falstaff.

A. Definitely.”

(RT 539:7-21.)

No. 21,253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the use and benefit of
FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the District Court of the
United States, Southern District of California, Central
Division.

PETITION FOR REHEARING.

DILLAVOU, COX, CASTLE & NICHOLSON,

By MICHAEL M. WEEKES,

626 Wilshire Boulevard,
Los Angeles, Calif. 90017,

Attorneys for Appellant.

FILED

AUG 15 1967

WILLIAM L. COX, CLERK

No. 21,253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the use and benefit of
FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Walter Ely, Circuit Judge, James R.
Browning, Circuit Judge, and Russell E. Smith,
District Judge:*

Appellant petitions this Court for a rehearing to reconsider the judgment entered in this action on July 19, 1967 for the following reasons.

Assuming, as the Court did, that the replacement panels were manufactured by Commercial for appellant and were appellant's panels when shipped to Shiff, the replacement panels were, therefore, the last material furnished by appellant. That fact seems to have escaped the attention of the Court in its Opinion. It is the "last furnishing" which *starts* the running of the 90 day notice period. [Public Buildings, Property, Etc., 40 U.S.C. §270b.] The Court erroneously concludes that the time for giving notice "had expired" before

the replacement panels were shipped and that there was no "extension" of the time for giving notice by the supplying of the replacements. The "Notice" time could not have "expired" when the "last furnishing" did not occur until March 31, 1964.

The affidavits, filed by appellant in opposition to the motion for summary judgment, amply show that Shiff believed that appellant was obligated to furnish the panels to Shiff in order that the contract could be completed. In his second affidavit, Beere says, regarding the March 17, 1964 conversation with Shiff's representative,

"The conversation in which we engaged on that occasion again related to the necessity that replacement panels be furnished to the March Air Force Base job in order that the contract could be completed there. Shiff's representative told me that the Federal Government was claiming that the floor system was partially defective, did not meet requirements of or otherwise fulfill the contract, and that new panels conforming to the contract requirements would have to be furnished by Reeder, Floating Floors, and Commercial Steel." [R. 102.]

By the subcontract agreement between Reeder and Shiff, Reeder obligated itself to furnish all necessary labor, equipment, and material for the complete installation of the raised computer floor, in complete accordance with contract plans and specifications. [R. 25.] Reeder, in turn, made an agreement with appellant wherein appellant undertook to furnish each and all of the parts and material necessary for the installation of the floor system required by the Reeder-Shiff subcontract. [R. 3, 4.] This contractual obligation was

not denied by appellee. [R. 9.] The replacement panels, when supplied by appellant in order to complete its contract, constituted the "last material furnished by appellant." That fact is the TURNING POINT in this case.

The appellant asks the Court to reconsider the cases cited by appellant on pages 13 through 17 of its Opening Brief.

In *United States v. Gunnar I. Johnson & Son, Inc., et al.*, 310 F. 2d 899 (1962, 8th Cir.), the Court held the time for giving the 90 day Miller Act notice commenced to run (was not simply extended) when the defective parts necessary to complete the contract and installation were replaced. The Court in that case stated on page 903 that "An enforceable claim herefor arose for the first time when they were 'furnished' in usable condition. . . ."

In *T. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company*, 207 F. 2d 337 (1961, 10th Cir.), a delivery by the claimant to the prime contractor of 198 feet of pipe, long after a previous delivery of 800 feet of pipe by the claimant to a subcontractor, started the running of the Miller Act Notice time. The Court, in its Opinion at page 338, indicates that, if the last delivery were made pursuant to the claimant's contract with the subcontractor, the notice, sent within 90 days thereafter, was sufficient.

For the Court to conclude that, since the notice time had expired at the date of the conversations between Shiff and appellant, neither Shiff nor appellee were

in any way obligated to appellant, overlooks the real issue—*i.e.* whether the notice time had expired. For had it not, then there is no basis for saying appellee was not obligated to appellant. While Shiff may not have been obligated to seek out and attempt to obtain replacements from appellant, the fact remains it did, and it insisted appellant should furnish them in order that the contract could be completed. [R. 102.]

One cannot conclude, after the conversations between Shiff and appellant relating to the replacement panels, that the appellant simply acted as a disinterested volunteer in having the panels manufactured for its account. There is no dispute by appellee that these same panels were delivered to Shiff. In this posture, how can it be said there was no genuine issue of material fact as to whether the “last furnishing” occurred on March 31, 1964 and the notice given within 90 days thereafter was timely?

DILLAVOU, COX, CASTLE & NICHOLSON,
By MICHAEL M. WEEKES,
Attorneys for Appellant.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

MICHAEL M. WEEKES



No. 21255 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS M. MURRAY; CYNTHIA ANN WENTY and CECELIA MARIE WENTY, Minors, by CLIFFORD H. WENTY, Their Guardian *Ad litem*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, a Sovereign Body,

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellants,

vs.

THE UNITED STATES OF AMERICA, a Sovereign Body,

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order entered on May 27, 1966, by the Honorable Charles H. Carr, Judge, United States District Court, Southern District of California, granting defendant's Motion to Dismiss without leave to plaintiffs to amend their Complaint, and dismissing their action with prejudice (R. 24-25). The underlying action was brought under the authority of 28 U.S.C. Sections 1346, 1402 and 2671-2680 (R. 3). The plaintiffs, on July 12, 1966, filed in this Court a timely application for Appeal under 28 U.S.C. 1291 (R. 30-31). This Court's jurisdiction accordingly rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE.

Barbara Murray, deceased, was the wife of Louis Murray and the mother of Cynthia Ann Wenty and Cecelia Marie Wenty. The deceased was killed in an automobile accident occurring on U.S. Highway 101-A on March 1, 1964. Louis Murray for himself, and the two daughters through their guardian *ad litem*, under authority of 28 U.S.C. 1346, 1402 and 2671-2680 (R. 3), brought an action for the wrongful death of Barbara Murray. The complaint alleged that the defendant, The United States of America, acting through its agents, conducted a ship's party in a Non-Commissioned Officers Club for the crew members of the U.S.S. Colohan. This party was attended by Jon David Allen, a member of the crew of the U.S.S. Colohan.

The complaint alleged that said Allen became intoxicated at said party, in whole or in part by intoxicating liquor sold or given away by the agents or servants of the defendant, The United States of America. The complaint further alleged that said agents continued to serve said Allen intoxicating liquors after he was already under the influence of intoxicating liquors knowing that he would thereafter drive his automobile.

The complaint alleged that, thereafter, said Allen drove his car negligently and recklessly on Highway 101-A in such a manner as to cause it to collide with the deceased's automobile, thereby causing her death.

On May 27, 1966, the District Court entered its order granting defendant's Motion to Dismiss without leave to plaintiffs to amend their complaint, and dismissing their action with prejudice (R. 24-25). This appeal followed (R. 30-31).

ARGUMENT.

It Was Error for the District Court to Dismiss, Because the Complaint States a Cause of Action for Negligence, Based Upon Principles Clearly Expressed and Frequently Followed by the California Supreme Court.

In its argument in the Court below, defendant pointed out that

“it is a well established principle that in a case such as this, the Federal Court should apply that law which the State Court would apply in such a case. 28 U. S. C. A. 1346(b); *Gilsoul v. U. S.*, 347 Fed. 2d 730 (7th Cir. 1965); *Ashley v. U. S.*, 215 Fed. Supp. 39 (D. C. Neb. 1963).”

However well established the principle, Federal District Courts nevertheless are at liberty to anticipate that a State Court will abandon a doctrine that is outmoded or discredited. *Hopper v. U.S.*, 244 Fed. Supp. 314, 318 (1965).

In the *Hopper* case, the Federal District Court was faced with the question of whether or not there could be recovery by a bystander-witness to an accident where the bystander-witness suffered mental suffering because of the effects of being such a witness. There was no “impact” insofar as the bystander-witness was concerned.

The Court was to apply Colorado law, but the Colorado Supreme Court had never decided the question of whether or not there could be recovery by a bystander in a situation where there was no impact. The Court said, at page 318:

“Like the impact rule it will be a matter of case to case attrition until its erosion is complete. In

the meantime it would be indeed presumptuous for this court to make an Erie prediction that the Supreme Court of Colorado will repudiate the limitation in one fell swoop. Although the specific question has not been before the Colorado Court, the available evidence does not show that it has any aversion to the limitation in question. In the light of the numerous American cases which hold non-liability in circumstances like the present, it cannot be predicted that the Supreme Court of Colorado would be likely to adopt a rule contrary to the formidable array of cases holding non-liability."

Because there were no Colorado cases, the Court applied the majority view.

Defendant, in its argument before the Court below, urged that *Hopper* had no application, because "there are numerous cases in California, all of which hold that there is no liability, where the alleged act or omission is the sale of intoxicating beverages to one who becomes intoxicated or is already intoxicated." This argument seeks to evade the issue; defendant is blind to the fact that the California cases it cites are readily distinguishable from the facts herein.

Defendant is also blind to the fact that the California Supreme Court has often seen fit to stake out new judicial ground. "The responsibility to keep the law straight is a high one," Chief Justice Traynor has written.

"It should not be reduced to the mean task of keeping it straight and narrow. We should not be misled by the cliché that policy is a matter for the Legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration." 24 *U. of Chicago Law Review* 211, 219 (1957).

Defendant is also apparently unaware that the applicable sections of the California Business and Professions Code, hereinafter discussed, have never been considered by the appellate courts in California in the present context.

In the court below, defendant relied upon *Cole v. Rush*, 45 Cal. 2d 345 (1955), which adhered to the general principle that the common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a liability on the seller for damages resulting from the intoxication. Specifically, the decision in the *Cole* case says (at p. 356):

“Since it is established by both the common law and by the decisional law in this state (1) that as to a *competent* person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use; (2) that the *competent* person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (3) that contributory negligence of the decedent bars recovery by the heirs or next of kin in a wrongful death action. . . .” (Emphasis supplied.)

It is submitted that in the present case the foregoing language has no application. In the first place, plaintiffs’ decedent was not contributorily negligent; in the second place, a drunk is not a competent person, and Jon David Allen, the deceased sailor who was served the intoxicants by the agents of the defendant, The United States, was not, by reason of his previous intoxication, a *competent* person.

Defendant also cites *Dwan v. Dickson*, 216 Cal. App. 2d 260 (1960), which followed *Cole v. Rush*, *op. cit. supra*, but applied the rule of that case on facts which more closely approximate those in the case at hand. Plaintiffs submit that the court in *Dwan* applied the rule of *Cole* in ignorance of the fact that the Legislature had provided a standard upon which to judge whether or not negligence exists in such cases. We will refer to this point specifically in following paragraphs.

We live in a motorized society. The increased frequency and severity of "accidents" resulting from intoxication is a subject of grave national concern. Consequently, as the civil remedies embraced within the tort of negligence expand in California to provide recovery in an ever increasing variety of situations, it follows that the Courts in this State should carefully examine the conduct of a purveyor who sells or gives intoxicants to a customer whom the purveyor knows is predisposed to the misuse of alcohol, *i.e.*, either already drunk or unusually likely to become so, and to exercise poor judgment in operating an automobile while under the influence of liquor.

It is familiar law that a cause of action for negligence consists of four elements: (1) the duty of the defendant with respect to the injured person's injury; (2) the violation of that duty; (3) the causal relation between the defendant's conduct and the injury suffered; and (4) the plaintiff's loss, *i.e.*, damages. Prosser, Torts (3d Ed.), page 146.

California courts have frequently held that negligence may be a proximate cause of injury even though a foreseeable negligent act intervenes.

The unlocked car cases illustrate the point. In *Richards v. Stanley* (1954), 43 Cal. 2d 60, 63, the court held that an owner of an automobile is generally under no duty to persons injured by one who steals the car. This was held true despite an ordinance requiring that cars be locked, on the grounds that the ordinance was held not designed to protect the victim of the thief's negligence. On page 65 the court said: "Ordinarily . . . in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another," and the court pointed out (on p. 66) that "in the present case Mrs. Stanley did not leave her car in front of a school where she might reasonably expect irresponsible children to tamper with it. . . ."

In a later case, *Richardson v. Ham* (1955), 44 Cal. 2d 772, a construction partnership was held liable for leaving an unlocked bulldozer in a place where it was readily accessible to teen-agers, and three of them did misappropriate it, subsequently seriously injuring the plaintiffs. The court held (on p. 776) that there was a reasonably foreseeable risk that defendants' bulldozer might be tampered with when left unattended. In *Hergenrather v. East* (1964), 61 Cal. 2d 440, the doctrine was extended, and liability was held to apply where a 2-ton truck was left unlocked and parked overnight on a city street known as "skid row."

It is true that California has no civil damage, or Dramshop Act. It is also true that "the Legislature of California has at no time seen fit to adopt a statute inconsistent with the common law so far as concerns a remedy for injury or death following the furnishing of liquor to the ordinary man." *Cole v. Rush, op. cit.*,

supra, page 355. It is to be noted, however, that the drunkard or one otherwise incapacitated, as by intoxication, is not an *ordinary man*, and the Legislature has adopted a statute which pertains to the drunk.

Business and Professions Code, Section 23001 could hardly be more explicit as to the persons it is designated to protect. It is

“an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social and moral well-being *and the safety of the State and of all its people*. All provisions of this division shall be liberally construed for the accomplishment of these purposes.” (Emphasis supplied.)

In light of the general purpose thus expressed, the fact that the Legislature then forbade the sale of liquor to drunkards or intoxicated persons (Sec. 25602) surely suggests legislative recognition that such sales pose an unreasonable risk.

In its points and authorities furnished the court below, defendant implied that Section 25602 of the Business and Professions Code had been considered by the court in making its decision in *Cole v. Rush*, *op. cit.*, *supra*. Close examination of the opinion in that case

(at p. 356) leads to the conclusion the court was entirely unaware of Business and Professions Code, Section 25602; viz:

“ . . . in the 10 years immediately following the decision in the *Hilton* case (1943) the Legislature made numerous changes in statutes governing the sale, use, and furnishing of intoxicating liquors (see e.g., Stats. 1945, pp. 1023, 2295, 2615; Stats. 1947, pp. 2003, 2051, 2490, 2791, 2936, 3019, 3025; Stats. 1949, pp. 492, 1546, 1582, 1884, 2060, 2349, 2735; Stats. 1951, pp. 1897, 2814, 3051; Stats. 1953, pp. 646, 918, 954, 1949, 2084, 3345) and also in statutes having to do with various aspects of tort liability (see e.g., Civ. Code, §§ 43, 43.5(a), 45a, 46, 47, 48, 48a, 48.5, 171(c), 956, 1714.5, 1714.6, 3341, 3342; Code Civ. Proc., § 377), but there was no adoption of a statute imposing liability in such a case as is now before us.”

The writer has been able to find only six decisions of California appellate courts in which Business and Professions Code, Section 25602 was squarely before the court:

Harris v. Alcoholic Bev. Etc. Appeals Bd., 62 Cal. 2d 589;

Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd., 169 Cal. App. 2d 785;

Skipitar v. Munro, etc., 175 Cal. App. 2d 1;

Samaras v. Dept. of Alcoholic Bev. Control, 180 Cal. App. 2d 842;

People v. Frangadakis, 184 Cal. App. 2d 540;

Peck's Liquors, Inc. v. Superior Court, 221 Cal. App. 2d 772.

None of the factual situations required consideration by the court of the Code section as a standard of conduct in a civil action. Accordingly, plaintiffs submit that in this context, it has never been construed by the California appellate courts, and it logically follows that if specified conduct is thus prohibited by the Legislature because the risks generated justify a legislative declaration as to their unreasonableness, this declaration can certainly be used as a standard of conduct in civil cases.

Placing intoxicating liquor in the hands of a drunk, knowing that the person intends to drink and drive is to create an unreasonable risk of injury to motorists and pedestrians. It is a risk readily foreseeable from the point of view of the purveyor at the time he is considering whether or not to make the sale. The California decisions cited above on analogous situations give support to this position.

In view of the foregoing discussion, and also in light of the trend of decisions in this particular realm of tort law in sister jurisdictions, viz:

Rappaport v. Nichols, 31 N.J. 188, 156 A. 2d 1 (1959);

Waynick v. Chicago's Last Dept. Store, 269 F. 2d 332 (7th Cir. 1959);

Soronen v. Olde Milford Inn, 202 A. 2d 208 (N.J. App. 1964);

Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A. 2d 550 (Pa. 1964);

Majors v. Broadhead Hotel, 205 A. 2d 873 (Pa. 1965);

Ramsey v. Melrose Grill, 211 A. 2d 900 (N.H. 1965).

it is respectfully submitted that the complaint does state a cause of action under an exception to the common law rule and it was error for the Court below to dismiss it.

JAMES G. BUTLER,
Attorney for Appellants

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JAMES G. BUTLER

No. 21255

IN THE

FEB 20 1967

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS M. MURRAY, CYNTHIA ANN WENTY and
CECELIA MARIE WENTY, Minors, by Clifford H.
Wenty, Their Guardian *Ad litem*.

Appellants,

vs.

THE UNITED STATES OF AMERICA, a Sovereign Body,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellants appeal from an order entered on May 27, 1966, by the Honorable Charles H. Carr, Judge of the United States District Court, Southern District of California, granting defendant's motion to dismiss without leave to plaintiffs to amend their complaint and dismissing their action with prejudice. [Clk. Tr. pp. 24-25.]

Plaintiffs had brought an action for wrongful death against the United States of America under authority of 28 U.S.C. §§ 1346, 1402, and 2671 through 2680. [Clk. Tr. p. 2.] Plaintiffs filed this appeal under 28 U.S.C. § 1291 and the court's jurisdiction rests upon this section.

Statement of the Case.

Appellants (plaintiffs below) have brought an action for the wrongful death of the wife of one of the plaintiffs and the mother of minors, on behalf of whom the action was brought by their guardian *ad litem*.

The complaint is set out in its entirety in the Clerk's Transcript at pages 4 to 6. It is properly summarized in appellants' statement of the case set out in appellants' opening brief at page 2.

Appellee filed a motion to dismiss and on May 27, 1966, an order was entered by the District Court granting the motion to dismiss without leave to plaintiffs to amend their complaint and dismissing the plaintiffs' action with prejudice on the ground that plaintiffs' complaint failed to state a claim upon which relief could be granted in favor of plaintiffs. [Clk. Tr. pp. 24-25.] Appellants appeal from this order.

Argument.

The District Court properly dismissed appellants' complaint on the ground that it failed to state a claim against the defendant, United States of America.

Under the provisions of 28 U.S.C. § 1346(b), the Federal Court should apply the law of the place where the act or omission occurred. In this case, since the act or omission occurred in the State of California, the District Court properly applied the law of the State of California.

Appellants, in their opening brief, cite the case of *Hopper v. United States*, 244 Fed. Supp. 314, 318 (D. Colo. 1965) for the proposition that the Federal District Courts may anticipate that a state will abandon

a doctrine that is outmoded or discredited. The appellants do not quote from the *Hopper* case; in fact, the above statement is not the holding of the court for the proposition on which this case actually stands.

The court actually said that, *in a case of first impression*, the Federal District Courts should anticipate what the Supreme Court of the state would do in such a case. In the *Hopper* case, the Federal District Court was faced with the question of whether or not there could be recovery by a bystander-witness to an accident, where the bystander-witness suffered mental suffering because of the effects of being such a witness. There was no "impact" as far as the bystander-witness was concerned.

The Federal District Court was to apply Colorado law, but the Colorado Supreme Court had never decided the question of whether there could be recovery by a bystander where there was no impact to the bystander.

The court said, at page 318:

"Like the impact rule it will be a matter of case to case attrition until its erosion is complete. In the meantime it would be indeed presumptuous for this court to make an Erie prediction that the Supreme Court of Colorado will repudiate the limitation in one fell swoop. Although the specific question has not been before the Colorado Court, the available evidence does not show that it has any aversion to the limitation in question. In the light of the numerous American cases which hold nonliability in circumstances like the present, it cannot be predicted that the Supreme Court of Colorado would be likely to adopt a rule contrary to the formidable array of cases holding nonliability."

Since there were no Colorado cases, the court applied the majority view.

Unlike the *Hopper* case, there are numerous cases in California holding that there is no liability where the alleged act or omission is the sale of alcoholic beverages. The California law is clear that one who sells alcoholic beverages to an intoxicated person or, for that matter, even to a minor, is not liable for damages caused by any acts of the intoxicated person. In *Cole v. Rush*, 45 Cal. 2d 345, 289 P. 2d 450 (1955), the Supreme Court of California stated the law of California, at page 349:

“ . . . [I]t is the general rule of law that it is the consumption of the intoxicating liquor which is the proximate cause of any subsequent injury by reason of such intoxication rather than the sale of intoxicating liquor.

The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking.”

The Supreme Court said, quoting from 30 American Jurisprudence 573, Section 607:

“ ‘The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a liability on the seller for damages resulting from the intoxication’ ”.

In the case of *Dwan v. Dickson*, 216 Cal. App. 2d 260, 30 Cal. Rptr. 690 (1963), the court considered the question of liability arising from the sale of alcoholic beverages to a person known to be intoxicated

and the subsequent injuries and deaths resulting from an automobile accident in which one of the automobiles was driven by the intoxicated person. The court said, at page 264:

“These authorities set forth the rule that the mere furnishing of alcoholic beverages, even to a person who is known to be intoxicated and is further known to be the driver in a motor vehicle, gives rise to no tort liability under California law.”

The Supreme Court of California denied the plaintiff's petition for hearing in this matter, thereby approving the decision of the District Court of Appeal.

Likewise, in the case of *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P. 2d 530 (1949), the court affirmed the sustaining of a demurrer without leave to amend where the third count of the complaint alleged

“that the fictitious defendants [the operators of a tavern] knew that he was a minor, and sold the intoxicating liquors to him *while he was already under the severe influence of intoxicating liquors.*”
(Emphasis added.)

The suit arose out of a subsequent automobile accident. (94 Cal. App. 2d at 247.)

In the case of *Thomas v. Bruza*, 151 Cal. App. 2d 150, 311 P. 2d 128 (1957), the court held that the mere sale of alcoholic beverages to one who became intoxicated did not state a cause of action, even though it was alleged that the saloon operator knew that the customer became quarrelsome and pugnacious when drunk.

Appellants, at page 5 of their opening brief, attempt to distinguish the *Cole* case, *supra*, on the basis that

the *Cole* case speaks of furnishing liquor to an ordinary person and that the deceased sailor in the case at bar was not an ordinary person because of his previous intoxication. While appellee submits that the court's decision did not hinge on the word "ordinary," the cases of *Hilton v. Dickson*, *supra*, and *Thomas v. Bruza*, *supra*, cannot be distinguished on this basis. As pointed out, *supra*, in the case of *Fleckner v. Dionne*, a demurrer was sustained even though it was alleged that the sale of intoxicating liquors took place "while he was already under the severe influence of intoxicating liquors."

Appellants, at page 7 of their opening brief, admit that California has no civil damage or dramshop act. Appellants then point out that the legislature enacted Business and Professions Code Section 25602. This section provides:

"Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard, or to any obviously intoxicated person is guilty of a misdemeanor."

This statute does not establish any civil liability. Although this statute was enacted in its current form in 1953, it was enacted in substantially its current form in 1935. Thus, this statute was in effect when all of the cases, previously cited by appellee for the proposition that there is no liability, were decided by the courts. Appellants argue that, because this code section was not cited by the court in *Cole v. Rush*, *supra*, the court was not aware of its existence. This is an obviously unfair analysis because, in the *Cole* case, 45 Cal. 2d at 351, the case of *Hilton v. Dwyer*, 61 Cal. App. 2d

803, 143 P. 2d 952 (1943), is discussed and, in this discussion, it is pointed out that it was alleged that the conduct in that case was in violation of the Alcoholic Beverage Control Act, which is the same Business and Professions Code section cited by appellants.

The California cases *are clear* that appellee The United States of America has no liability based upon the facts alleged in plaintiffs' complaint.

Appellants, at page 4 of their opening brief, admit that, because there were no Colorado cases applicable to the *Hopper* case, 244 Fed. Supp. 314 (D. Colo. 1965), the court applied the majority view. Appellants then argue that the California cases stating that there is no liability merely from the sale of intoxicating beverages are distinguishable from the case at bar.

Appellee submits that the cases are not distinguishable.

The majority rule in the United States, as in California, is that, absent a statute establishing civil liability for the sale of intoxicating beverages, there is no civil liability. 75 A.L.R. 2d 834 states:

"Summarizing the decisions, without at this point going into detail, it may be said that generally there is no right of action at common law for damages sustained by the plaintiff in consequence of the sale or gift of intoxicating liquor to another."

There are only three jurisdictions which, in the absence of such a statute, allow recovery. These are the states of New Jersey, Pennsylvania, and New Hampshire, and the applicable cases are cited at page 10 of appellant's opening brief. The important thing to note is not the cases cited, but, rather, the fact that the cases

are from only three jurisdictions. Thus, appellants are arguing that the Federal District Court erred when it did not overturn existing California cases which hold no liability and adopt a rule enacted in only a small minority of states. This is contrary to what the Court of Appeals in the *Hopper* case, *supra*, states that the Federal Courts should do.

Thus, appellants would have this Court reverse the Federal District Court, overrule the California cases directly on point, and establish a minority rule for the state of California.

Appellee respectfully requests that the decision of the District Court of Appeal be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

RICHARD A. CURNUTI

No. 21275

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

WEYERHAEUSER COMPANY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY TO PETITION FOR REHEARING

CLYDE O. MARTZ,
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2

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43 U.S.C. sec. 752 -----

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21275

UNITED STATES OF AMERICA,

Appellant

v.

WEYERHAEUSER COMPANY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY TO PETITION FOR REHEARING

The United States believes that the decision of this Court is correct. The opinion is supported by the record and does not overlook any controlling matters of law or fact. Weyerhaeuser Company's petition demonstrates no reason for a rehearing and should be denied. We will now treat seriatim the arguments raised by Weyerhaeuser Company.

1. (a) We agree with appellee that this Court's description of the hiatus area in dispute is incomplete. A complete description appears as a map in the district court's opinion (R. 96). In the pretrial order under agreed facts it was stipulated that the area in dispute was depicted by Exhibits 1 and 14 (R. 73). These exhibits have been filed with the Court. The description of the hiatus area presented in the opinion might be modified to conform to the stipulation. Certainly this is no reason for granting a rehearing, especially since the judgment directed is simply dismissal of the complaint and not a formal quiet title decree.

(b) This Court's opinion is in harmony with United States v. Hudspeth, 384 F.2d 683 (C.A. 9, 1967). Both opinions recognize that once land is patented the official survey on the ground--no matter how erroneous--is controlling. Appellee's mistake is its failure to understand what this Court has held in this case.

2. The competency of the official surveyors is irrelevant to the issue presented. The Court correctly recognized that "Neither [side] claims that Hathorn was a more competent surveyor than Haydon [sic], or vice versa" (Opinion,

p. 4-5). No matter how competent, or for that matter incompetent Heydon may have been, his was the official survey of Township 27 (R. 76).

3. Another irrelevancy raised by appellee is that the Court overlooked the function of a standard parallel. That function--to correct for convergency of meridians--has nothing to do with the fact that the survey of Township 28 was based upon the standard parallel as surveyed on the ground by Hathorn and that the survey of Township 27 was based upon the standard parallel as surveyed on the ground by Heydon (R. 74-75, 76).

4. Appellee correctly claims that the "decision states that neither party attempts to tell the court where the 6th Standard Parallel really is, in the disputed area." Neither side attempted to tell the Court where the 6th Standard Parallel would be if it had been surveyed truly due west as ideally intended. Indeed, neither the Hathorn line nor the Heydon line was ideally located. Drawn ideally, the true line would fall between Hathorn's monuments and Heydon's monuments. However, this does not bear on the issue, which is the effect of the surveyors' establishing on the ground two separate lines.

5. Appellee's argument as to precisely when the Hathorn monuments were uncovered appears to be quibbling. The relationship of the two lines is shown by the recovered monuments (R. 96; Ex. 1, 14). The record shows that in 1961 the existence of two sets of monuments was discovered (R. 77). Whether Hathorn's monuments were known or unknown over the years has nothing to do with the legal effect of two sets of monuments not being on the same line. Heydon's monuments mark Township 27, and his survey of that township was officially approved in 1897 (R. 76); Hathorn's monuments mark Township 28, and his survey of that township was officially approved in 1856 (R. 74-75). Patents to the sections in Township 27, on the basis of which appellee makes its claim, were first issued beginning in 1903 (R. 37-38).

6. Weyerhaeuser Company's final assertion that the opinion leaves property owners without guidelines to resolve similar disputes is false and irrelevant. Indeed, the opinion is based upon the fundamental principle of public land law that "boundary lines actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary

nes of the sections, or subdivisions, for which they were
tended * * *." 43 U.S.C. sec. 752; Cragin v. Powell, 128
S. 691, 696-700 (1888); United States v. State Investment
. , 264 U.S. 206, 211-212 (1924). The opinion is based upon
rule of repose.

CONCLUSION

For the foregoing reasons, appellee's petition for
hearing should be denied.

Respectfully submitted,

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BRUARY 1968

NO. 21281

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH MALDONADO VASQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

MAR 10 1967

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MAR 10 1967

NO. 21281

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH MALDONADO VASQUEZ,

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BRIEF OF APPELLEE

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NO. 21281

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH MALDONADO VASQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

I

STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

On March 23, 1966, the Federal Grand Jury for the Southern District of California returned a two-count indictment against the appellant charging him with knowingly and unlawfully receiving, concealing, and selling a narcotic drug in violation of Title 21, United States Code, Section 174 [C. T. 2-3]. 1/

Pursuant to a plea of not guilty, trial by jury commenced on May 31, 1966 [R. T. 11]. 2/ The jury returned a verdict of guilty

1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.

on both counts (violations of Title 21, U.S.C. Section 174), on June 3, 1966 [R. T. 161-162].

Count One charged:

On or about October 4, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant JOSEPH MALDONADO VASQUEZ knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 3.260 grams of heroin, a narcotic drug, which, as the defendant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, Section 173.

Count Two charged:

On or about October 4, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant JOSEPH MALDONADO VASQUEZ knowingly and unlawfully sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics 3.260 grams of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 173.

On June 28, 1966, Judge Francis C. Whelan committed appellant to the custody of the Attorney General for concurrent

terms of six years on each count [C. T. 4].

Timely notice of appeal was filed on July 5, 1966 [C. T. 5].

Jurisdiction of the District Court was based upon Title 28, United States Code, Section 3231.

Jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 173, reads as follows:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or

jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. "

Title 21, United States Code, Section 174, reads as follows:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after

being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

1. DID THE COURT ABUSE ITS DISCRETION IN FAILING TO EXCLUDE A GOVERNMENT AGENT FROM THE COURTROOM?
2. WAS APPELLANT ENTRAPPED AS A MATTER OF LAW?
3. IS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

IV

STATEMENT OF FACTS

For some time prior to October 4, 1965, Federal Bureau of Narcotics Agents had been aware, through "word on the street",

that a certain individual was active in the traffic of narcotic drugs in the general area of First and Breed Streets, Los Angeles [R. T. 100].

Shortly before October 4, 1965, Robert Luna informed Federal Bureau of Narcotics Agents Celaya and Watson that appellant was selling heroin in the First and Breed Streets area and offered to see what he could do to make a purchase from appellant [R. T. 59]. Luna, who had known the appellant for approximately a month, was aware that the appellant was engaged in the business of selling heroin in the area from appellant's sales to acquaintances of Luna [R. T. 57], and from prior purchases from appellant by Luna [R. T. 59]. On October 4, 1965, Luna saw appellant on the street and asked to buy a quarter ounce of heroin. The appellant promptly agreed to sell it to Luna. A meeting was then arranged for the purpose of completing the sale of the heroin [R. T. 58]. Later the same day, after having notified Agents Celaya and Watson, Luna purchased 3.260 grams of heroin from appellant while under the surveillance of the agents [R. T. 51, 88].

Appellant was identified at the trial as the person from whom Luna purchased the heroin by both Luna [R. T. 48-49], and Celaya [R. T. 89].

Appellant was also identified as the individual who was actively engaged in the sale of heroin in the area of First and Breed Streets, Los Angeles, by Luna [R. T. 57, 84], and Celaya [R. T. 99-100].

V

ARGUMENT

A. DENYING OF APPELLANT'S MOTION
TO EXCLUDE A WITNESS WAS NOT
ERROR.

At the beginning of the trial, appellant moved to exclude witnesses from the courtroom. The trial judge then indicated that he would allow one Government agent to remain if the Government needed him and asked the Government counsel whether the agent's presence was necessary. The reply was affirmative and the agent was allowed to remain [R. T. 45]. Appellant contends that this ruling was an abuse of discretion.

It is axiomatic that exclusion of a witness is a matter within the discretion of the trial court and the exercise of that discretion will not be disturbed unless there is a clear abuse apparent from the record. United States v. Infanzon, 235 F.2d 318 (2nd Cir. 1956); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Powell v. United States, 208 F.2d 618 (6th Cir. 1953), cert. denied, 347 U.S. 961 (1953).

In similar situations, it has been held that allowing a Government agent to remain in the courtroom during the testimony of other witnesses, even though the agent later testified, is not an abuse of discretion. Roberson v. United States, 282 F.2d 648 (6th Cir. 1960); Portomene v. United States, supra.

Moreover, absent a showing of manifest prejudice to the defendant, the refusal to exclude witnesses on the ground that the

defense is "mistaken identity" is not an abuse of discretion, and would be harmless error even assuming that the refusal was erroneous. Kaufman v. United States, 163 F.2d 404 (6th Cir. 1947); see Laird v. United States, 252 F.2d 121 (4th Cir. 1958); 18 U.S.C., Rule 52(a).

That an opportunity for matching narratives is presented by the failure to exclude a witness does not automatically constitute prejudice to the defendant, nor does it compel a finding that the trial court abused its discretion. See Roberson v. United States, supra; Powell v. United States, supra. Noticeably, appellant cites no case in which it was determined that a Government agent must be excluded by the trial court if failure to do so will present an opportunity for matching narratives. In fact, each case cited by appellant stands for the proposition that the trial court's discretion will not be disturbed unless a clear abuse is shown and that no such showing was made.

Appellant contends that the trial court abused its discretion by failing to require the appellee to show the necessity of the agent's presence. No authority is cited for this proposition, and no case has been found which holds that it is an abuse of discretion for the trial court to fail to require such a showing.

Appellant did not seek to be heard further on his motion for exclusion of witnesses after the court granted it in part, although the court had not forestalled that opportunity. It is evident from the record that the appellant cannot now assert that he was not afforded the opportunity to be heard.

In any event, appellant does not advert to any evidence, other than the relatively consistent testimony of Luna and Agent Celaya, to buttress his conclusion that he was prejudiced. In view of the overwhelming evidence against appellant, it is clear that no manifest injustice or prejudice resulted from the court's ruling, and assuming arguendo that the ruling was erroneous, only a harmless error has been shown, and no miscarriage of justice has resulted.

**B. THE EVIDENCE DOES NOT
ESTABLISH ENTRAPMENT AS
A MATTER OF LAW.**

The leading case of Sherman v. United States, 356 U.S. 369 (1958), expresses the aim of the courts in dealing with the entrapment issue, as follows:

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372.

In drawing this line, a material consideration is whether there is significant evidence that a defendant was in the trade. Id. at 375.

Another factor to consider is:

" . . . [T]he nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the

particular criminal business is carried on." Id. at 385.

In the instant case, the record clearly demonstrates the willingness and readiness of the appellant, as a professional heroin seller, to commit the crime. His predisposition is evidenced by the alacrity with which the informer's offer to buy was accepted [R. T. 49, 58]. Additionally, the second factor mentioned in Sherman is present here, since the offense (sale of narcotics) is difficult to detect and secret transactions are typical of the manner in which this criminal business is conducted.

Once the defense of entrapment has been raised, according to the First Circuit Court of Appeals, two issues must be considered: Inducement and predisposition.

"On the other hand, the mere fact that the opportunity to commit the offense was afforded to a man waiting for such an opportunity does not mean that the government was the effective cause of his criminal conduct.

The question is, who generated it? Thus, in every case of entrapment there are two possible issues.

(1) Did the government put in motion this particular offense; and (2) did it initiate the defendant's criminal state of mind, or only activate it? The first issue is called inducement; the second is considered in terms of defendant's predisposition."

Sagansky v. United States, 358 F.2d 195, 202

(1st Cir. 1966).

Although the government induced defendant's act, entrapment as a defense will be precluded if defendant's predisposition to commit the offense is proved beyond a reasonable doubt.

"If, . . . there was inducement as a matter of law, then only the question of predisposition is submitted to the jury and the government has the burden of proving it beyond a reasonable doubt. "

Id. at 203; see also Notaro v. United States,
363 F.2d 169 (9th Cir. 1966).

Applying this analysis to the present case, even though appellant was induced by the Government, it is manifest from the record that he was no unwary innocent. On the contrary, he was so eager to engage in the illegal transaction that one casual request, one offer to buy, made in mid-afternoon on a busy street corner without any preliminary conversation was sufficient to induce the appellant to commit the criminal acts [R. T. 49, 58]. This fact is uncontroverted, as the record indicates. Appellant did not offer at the trial any evidence to negate the inferences arising from appellant's immediate agreement to deliver heroin to the informer for a price. It is submitted that this fact alone indicates appellant's predisposition to commit the crime.

Appellant ignores the predisposition issue in his brief, but asserts error by contending that no probable cause for the inducement existed. In support of this contention, appellant relies upon the first Whiting case, Whiting v. United States, 296 F.2d 512 (1st Cir. 1958), which holds that the Government could not introduce

hearsay in rebuttal to establish that before the defendant was approached, the Government had legally adequate evidence of his predisposition to sell narcotics.

After a second trial in which no hearsay was offered, the case was again before the First Circuit Court of Appeals in Whiting v. United States, 321 F.2d 72 (1963), cert. denied, 375 U.S. 884 (1963). In affirming the conviction, the court rejected defendant's contention that it is per se improper conduct by the Government to offer inducement without prior good reason to suspect guilt.

"We do not agree. Solicitation to commit a crime does not in itself involve constitutional rights, and is not comparable to the arrest of a person or to the invasion of premises." Id. at 74.

And, the court held, " . . . [I]t is not offensive conduct for the Government to initiate inducement without a showing of probable cause." Id. at 77.

The second Whiting case rejects the contention raised in this appeal, and holds that although inducement was offered, if no corruption of appellant resulted, he was not illegally entrapped. Moreover, even under the first Whiting decision, appellant's conviction must be affirmed, since here, unlike the facts of that case, the record reveals substantial admissible evidence to support a finding that the Government had probable cause to suspect appellant as a narcotics dealer.

Even if the first Whiting case were pertinent, the rule in this Circuit is to the contrary. It has long been held by the Ninth

Circuit Court of Appeals that hearsay is admissible to establish both probable cause for inducement and predisposition. In Trice v. United States, 211 F.2d 513 (9th Cir. 1954), cert. denied, 348 U.S. 900 (1954), the Court affirmed a conviction for the unlawful sale of narcotics. In the court below, Judge Mathes had permitted the Government to introduce in rebuttal the uncorroborated testimony of a Government agent that he had heard from various sources that defendant was involved in the sale of narcotic drugs. There was no evidence that the defendant had ever been arrested, charged with, or convicted of a violation of Federal or State narcotics laws. Appellant contended that the evidence regarding inducement and predisposition was hearsay and too remote in time to be admissible. The Court rejected this contention, holding that "hearsay evidence, in the circumstances, was proper" and that it was not so remote as to be inadmissible. 211 F.2d at 519.

Another important distinguishing factor from the first Whiting case should be noted. In Whiting, as in Trice, the hearsay was offered by the Government in rebuttal. Here, the hearsay was elicited by appellant on cross-examination.

Counsel for the appellant asked Luna, the informer, whether he had offered to buy heroin from appellant "just out of the blue" [R. T. 56-57]. Luna responded by relating factors upon which he based his conclusion that appellant was a dealer. Assuming without conceding that Luna's response was hearsay (since it did not prove the truth of the statements but only the informer's state of mind and appellant's predisposition), appellant is bound by the



response to his question. See Wigmore, Evidence §18 (1940). Luna also testified, in response to appellant's question, that he had purchased heroin from appellant before, and knew others who had done the same [R. T. 59]. Later, in response to appellant's questions, Agent Celaya testified that he had been informed, through word on the street, that appellant was in the business of selling heroin. Appellant made no motion to strike this response [R. T. 99-100].

From the foregoing, it is submitted that not only was probable cause for the inducement established by admissible evidence, but the evidence is clearly sufficient to establish beyond a reasonable doubt defendant's predisposition to commit the crime. Evidence of prior sales to Luna [R. T. 59], and others [R. T. 57], and the information received from others that appellant was a dealer [R. T. 99-100], justifies the inducement and is sufficient to establish beyond a reasonable doubt that appellant was not corrupted by that inducement. The uncontroverted testimony regarding the circumstances surrounding the transaction and the events leading up to it precludes a determination that appellant was entrapped as a matter of law.

C. THE EVIDENCE IS SUFFICIENT TO
SUPPORT THE VERDICT.

Appellant does not recite, and no such recital is possible, that a motion for acquittal on the ground asserted herein, or on any ground, was made by appellant at any time. 18 U.S.C., Rule 29.

It is uniformly held that absent a motion for judgment of acquittal at the close of all the evidence, the sufficiency of the evidence will not be reviewed unless the verdict is palpably wrong. Maxfield v. United States, 360 F.2d 97 (10th Cir. 1966). And, it is frequently said that the sufficiency of the evidence will only be reviewed, where no motion has been made, to avoid a manifest miscarriage of justice. A miscarriage of justice would exist only if it appears that the record is devoid of evidence pointing to guilt. Garrett v. United States, 356 F.2d 921 (5th Cir. 1966). It almost goes without saying that the record in the instant case shows substantial evidence pointing to defendant's guilt. In fact, the evidence of his guilt is overwhelming.

Appellant attempts to show that because of the witnesses' mistaken belief as to his name, there was no identification of him as the person who committed the acts. To buttress this contention, appellant refers to the Analyzed Evidence Report bearing the name "Joseph M. Masuda" and the testimony of Agent Celaya that another "Mazuto" appeared in the records [Appellant's Brief, 10-11]. The record, however, does not support this contention that the identity of the appellant was not established. The informer, Mr. Luna, testified that the appellant, who was sitting in the courtroom, was the person who sold and delivered the narcotics to him [R. T. 48-49]. Likewise, the Government Agent, Mr. Celaya, identified the appellant [R. T. 89]. Luna expressly testified that the appellant, although known to Luna as "Joe" and "Joe Mazuto", was the specific individual who was then sitting at the defense table

and who was the person involved in the transaction on October 4, 1965 [R. T. 48-49, 85].

As mentioned above appellant argues that the record does not disclose any connection between the Analyzed Evidence Report, Government Exhibit No. 1, and the appellant because of the mistake as to appellant's real name. The record reflects Luna's testimony that Government Exhibit No. 1 was received from the man identified in court as the appellant [R. T. 53]. Agent Celaya testified that Exhibit No. 1 was received from Luna shortly after it came into Luna's possession and that Luna was under surveillance during the period of his possession [R. T. 88]. At that time, Luna and the agents thought the man from whom it was received was named "Joe Mazuto", or "Masuda", which is why the evidence report bears that name.

However, whether this particular man, appellant Vasquez, was known by the name or names of "Joe", "Mazuto", or any other, is immaterial to the identification of him as the particular person involved in the transaction for which he was convicted.

When considering the sufficiency of the evidence, an appellate court must view the evidence taken at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942).

If the court then finds substantial evidence, it must presume the findings of the trier of fact to be correct, and the judgment must be sustained. Noto v. United States, supra; Ingram v. United States,

360 U.S. 672, 678 (1959).

The credibility of witnesses and the weight to be given their testimony is a matter within the province of the trier of fact.

Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950).

The record before this Court discloses more than substantial evidence to support the verdict.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be approved.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN
Assistant U. S. Attorney

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK FINEBERG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

JUN 9 1967

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS
DISCLOSING JURISDICTION

Appellant Jack Fineberg appeals from his conviction on eighteen counts of a twenty-count indictment charging him with violations of Title 18, United States Code, Section 1341 [Mail Fraud], Section 1342 [Use of a Fictitious Name to Defraud], and Section 1343 [Wire Fraud]. Appellant was charged with co-defendant Nelson Bureau of Employment, a corporation doing business as Merco Sales, against whom the Government dismissed its case subsequent to Appellant's trial.

All of the counts of the indictment relate to a scheme to

defraud various record distributing firms. The scheme is alleged in Count One of the indictment [C. T. p. 2]. ^{1/} That count charges Appellant with having devised a plan whereby he would use Merco Sales Corporation to place orders with record distributing firms for shipments of phonograph records. It is charged that misleading mailings fraudulently represented that Merco Sales was a well-established business firm. It is further alleged that after accepting and retaining merchandise from the record distributors, Appellant did not remit full payment and that he did not intend to remit full payment. It is stated that Appellant resold the merchandise that he purchased from the distributors in amounts from 10 to 20 percent below cost, thus forcing Merco Sales into a state of bankruptcy, preventing full payment to the distributors as impliedly promised under usual business practice. Finally, the scheme charges that Appellant lulled the distributors into a false sense of security by various fraudulent acts [C. T. p. 4].

The indictment was filed on January 10, 1966 [C. T. p. 2].

Jury trial commenced before the Honorable Francis C. Whelan, United States District Judge on June 13, 1966 [R. T. p. 85]. ^{2/}

On June 27, 1966, Appellant was found guilty by the jury on Counts One, Two, Three, Four, Five, Six, Seven, Eight and Nine [Mail Fraud]; Counts Ten, Eleven, Twelve, Thirteen and

^{1/} "C. T." refers to Clerk's Transcript.

^{2/} "R. T." refers to Reporter's Transcript.

Fourteen [Use of a Fictitious Name to Defraud], and Counts Seventeen, Eighteen, Nineteen and Twenty [Wire Fraud] [C. T. p. 87]. Appellant was found not Guilty as to Counts Fifteen and Sixteen [C. T. p. 74].

On July 21, 1966, Judge Whelan sentenced Appellant to a term of imprisonment totalling four years, fines totalling \$5,000 and a period of five years probation after service of the four year term of imprisonment.

The United States District Court for the Southern District of California had jurisdiction of this case based upon Title 18, United States Code, Sections 1341, 1342, 1343, and 3231. The jurisdiction of this Court rests upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1341 provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years or both."

Title 18, United States Code, Section 1342 provides as follows:

"Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in Section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of

mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1343 provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Were certain of the Government's exhibits which consisted of business records of Merco Sales, a corporation, improperly admitted into evidence and was the admission of such evidence a violation of Appellant's Fifth Amendment privilege against self-incrimination?

2. Was evidence concerning a prior, similar scheme to defraud, conducted by Appellant, improperly admitted into evidence?

3. Did the Court improperly exclude expert testimony proffered by Appellant concerning the feasibility of Appellant's business plan?

B. Statement of Facts.

Count One of the indictment charges Appellant with devising a scheme to defraud Record Distributing firms located throughout the United States by means of false and fraudulent pretenses, representations, and promises [C. T. p. 2]. It is charged that Appellant accomplished this scheme in the following manner:

(1) By causing to be filed with the State of California

a Certificate of Corporation on behalf of Nelson Bureau of Employment for transaction of business under the fictitious name Merco Sales [C. T. pp. 2-3];

(2) By placing orders with the record distributing firms here involved, which orders were designed falsely to represent that Merco Sales was a well established business firm [C. T. p. 3];

(3) By Appellant's use of assumed names, including George Evans and Jack Fine, in orders and correspondence directed to the record distributors [R. T. p. 3];

(4) By causing the distributors to ship merchandise to Appellant as a result of orders placed with the distributors by Appellant [R. T. p. 3];

(5) By accepting and retaining the merchandise shipped to him for which he never intended to remit full payment and did not make full payment [C. T. p. 3];

(6) By falsely representing in orders, correspondence, and communications with the record distributors that full payment would be made in accordance with usual business practice [C. T. p. 3];

(7) By reselling the merchandise he had purchased from the record distributors in amounts from 10 to 20 percent below cost, thus forcing Merco Sales into a state of Bankruptcy and preventing full payment to the distributors [C. T. p. 4];

(8) By lulling the distributors into a false sense of security so as to prevent them from complaining by:

(a) Making partial payments for merchandise;

- (b) Creating the false inference that Appellant was conducting a flourishing and profitable business;
- (c) Entering into agreements with the distributors to make payments for past merchandise and transmitting post-dated checks so that Appellant could continue to order merchandise from the distributors [C. T. p. 4].

It is alleged in the Counts here involved that the mails, Post Office Department, and Interstate wire facilities were used to expedite and further the scheme [C. T. pp. 4-24].

Appellant does not question the sufficiency of the evidence. Briefly, the following evidence was adduced at trial to support the Government's case:

John F. O'Brien, a wholesale record distributor, and an officer of the John O'Brien Distributing Company and Volume Record Sales [R. T. pp. 176-177] testified that the John O'Brien Company received a letter dated September 9, 1963 [Plaintiff's Exhibit 123] bearing the signature of George Evans [R. T. p. 180]. That letter read substantially as follows:

"Dear Sir:

"We are large buyers of LP records.

Enclosed please find our first order. Please give us your lowest price, as these are the type of orders we would buy several times a month.

"Let us hear from you as soon as possible. We pay all freight charges and all sales are final.

"If there are any questions please call us
collect.

"Thanking you in advance, I remain

"Respectfully yours,

"Merco Sales.

"(Signed) George Evans."

Four or five days later, O'Brien telephoned Evans in Los Angeles [R. T. p. 180]. During that conversation the person purporting to be Evans stated to O'Brien that he desired to buy phonograph records from O'Brien because O'Brien carried a large number of labels [R. T. p. 187]. O'Brien stated to Evans that he could not sell records cheaper than California distributors, and that since the O'Brien Company was located in Wisconsin, some two-thousand miles away, eight or nine cents would be added to the cost of each record by reason of the cost of air transportation [R. T. p. 186]. O'Brien further testified that Merco Sales commenced purchasing records in September, 1963, and continued to do so in September and October, 1963 [R. T. p. 190]. During this period of time, payments were timely, but became slower in November and December [R. T. p. 190].

Later, O'Brien began to receive post-dated checks from Merco, although there had been no agreement that Merco would issue post-dated checks. When deposited, many of these checks were returned because there was not sufficient funds in Merco's account to cover them [R. T. p. 191]. One such check was sent

with a note signed by "Jack" and requested Mr. O'Brien to deposit that check on June 23rd [R. T. pp. 192-193]. O'Brien held three post-dated checks [Plaintiff's Exhibits 126, 488, 489]. During the period of time that these checks were held, O'Brien at Appellant's request shipped further merchandise to Merco [R. T. p. 195]. After deposit, these checks were returned because of non-sufficient funds [R. T. p. 196].

O'Brien telephoned Merco Sales after these checks were returned unpaid and a person who identified himself as Jack Fine [R. T. p. 196] stated that O'Brien would be paid what he was owed [R. T. p. 197]. Mr. O'Brien's companies were not paid, and suffered a loss of \$79,855.72 [R. T. p. 198].

In January, 1964, O'Brien came to Los Angeles, and stayed at the Beverly Hills Hotel [R. T. p. 184]. While there, he received a telephone call from a man identifying himself as George Evans, who stated that he was down in the lobby of the hotel [R. T. p. 183]. Shortly thereafter, Appellant Fineberg came to O'Brien's room and identified himself as Jack Fine [R. T. p. 184]. O'Brien recognized Appellant's voice as that of the person with whom he had previously conversed and who had identified himself as George Evans [R. T. pp. 184-185].

During the same period of time, Appellant Fineberg was dealing with Carl Glaser, who operated Metro Record Distributing Corporation and Disceries, Incorporated, of Buffalo, New York. Glaser was contacted by "George Evans" in September, 1963 [R. T. pp. 284-285]. Arrangements were made to ship phonograph records

to Merco upon the following terms: Half of the amount of the payment at time of shipment, the remainder of payment at the time of receipt of the second shipment [R. T. p. 286]. During the first three or four shipments, payments were timely, but later on payments became slow [R. T. p. 288]. In March, 1964, Glaser began to receive post-dated checks along with requests for additional phonograph records [R. T. p. 288]. Certain of these checks were returned unpaid [R. T. p. 290], resulting in a loss to Merco of \$4,340.00 and to Disceries in the sum of \$2,960.00 [R. T. p. 291].

Louis Lavinthal, operator of West Coast Record Distributors of Bellevue, Washington [R. T. p. 325], was similarly contacted by George Evans in July, 1963. Evans stated he desired to purchase records from Lavinthal so that he could sell them to chain or discount stores on the eastern seaboard. Evans also told Lavinthal that he preferred purchasing records from Lavinthal because Lavinthal carried many labels, and this method of purchasing would obviate the necessity of purchasing from eight or ten distributors [R. T. pp. 327-328].

Arrangements were made to ship records with half payment to be made at the time of order and the balance to be paid C. O. D. [R. T. p. 331]. In September, 1963, at Evans request, the method of payment was modified so that half payment would be made at the time of ordering, but the remaining half could be paid after receipt of the records [R. T. p. 334].

In June, 1964, Appellant Fineberg visited Mr. Lavinthal in

Seattle, Washington. At that time, Appellant owed \$15,000 - \$17,000, and requested a different method of payment [R. T. p. 338].

Checks made payable to Lavinthal's companies began to be returned for insufficient funds [R. T. p. 339]. Lavinthal's losses as a result of doing business with Merco amounted to \$44,457.03 [R. T. p. 340].

Arthur Freeman, who was associated with the Benart and Concord Distributing Companies of Cleveland, Ohio [R. T. pp. 394-395] was contacted by George Evans, and began to sell records to Merco [R. T. p. 402]. Later, Freeman was pressured by Merco for more lenient terms [R. T. p. 403]. Payments became slower [R. T. p. 406], balances were increasing [R. T. p. 407] and a stop payment check was received [R. T. pp. 408-409], resulting in a loss of \$10,359.60 [R. T. p. 409].

Similarly, John Cohen, owner of Seaway Distributors Incorporated of Chagrin Falls, Ohio [R. T. p. 423] lost \$9,511.00 as a result of sales to Merco [R. T. p. 434].

Gerber Distributing Company lost approximately \$23,000.00 [R. T. p. 451]. According to William W. Gerber of Syracuse, New York [R. T. p. 444], he was first contacted by letter from Merco [R. T. p. 445]. Telephone calls with George Evans followed in July, 1963 [R. T. p. 445]. Merco began to purchase records, and balances increased [R. T. p. 448]. Bounced checks followed [R. T. p. 449].

Harvey L. Korman of Great Lakes Distributing Company

and Buckeye National Sales Corporation in Cleveland, Ohio [R. T. pp. 474-475] lost \$65,290.50 [R. T. p. 448] as a result of sales to Merco, insufficient fund checks and non-payment [R. T. pp. 474-492].

Hereinbelow is set forth the cost to Appellant of the records sold to him by the above-mentioned distributors:

Chart No. 1

<u>RECORD DISTRIBUTOR</u>	<u>COST TO APPELLANT</u>			<u>LOSS SUSTAINED BY DISTRIBUTOR</u>	<u>REPORTER'S TRANSCRIPT REFERENCE</u>
	<u>\$3.98</u>	<u>\$4.98</u>	<u>\$5.98</u>		
John F. O'Brien John O'Brien Dist. Volume Record Sales	1. 60-1. 85	2. 35-2. 50	2. 50-3. 00	\$79, 000	(200-204) (280)
Carl Glasser Metro Record Dist. Corp. Disceries Inc.	1. 70-1. 87	2. 24-2. 50		7, 300	(285-293) (291)
Louis Lavinthal West Coast Record Dist. C & C Dist. Northwest Record Center	1. 78-1. 89	2. 06-2. 86	2. 47-3. 15	44, 457. 03	(341) (340)
Arthur Freeman Benart Dist. Co. Concord Dist. Co.	1. 78-1. 89	2. 22-2. 37	2. 50	10, 359. 60	(419) (409)
John B. Cohen Seaway Distributors Inc.	1. 75-1. 99			9, 511	(435) (434)
Wm. W. Gerber, Jr. Gerber Dist.	1. 75-1. 89	2. 18-2. 30		23, 000	(451) (451)
Harvey L. Korman Great Lakes Dist.	1. 75-1. 98	2. 25-2. 49	2. 88-2. 99	65, 290. 50	(490) (488)

Appellant Fineberg sold phonograph records to other record distributors at the following prices:

Chart No. 2

<u>APPELLANT'S SALES OUTLETS</u>	<u>APPELLANT'S SALES PRICE</u>			<u>TOTAL PURCHASES FROM APPELLANT</u>	<u>REPORTER'S TRANSCRIPT REFERENCE</u>
George D. Hartstone Hart Distributors Cal Racks, Inc.	1. 62-1. 65	2. 02	2. 25	\$105, 000	(551-558) (547)
Richard S. Baum B & R Record Distributors B & G Music Shop	1. 40-1. 65	1. 80-2. 00	2. 30-2. 50	145, 000	(633) (645)
William E. Cohan National Trade	1. 521/2- 1. 621/2	1. 75- 1. 971/2	1. 971/2	250, 000	(674) (677)
Charles O. Simms White Front Stores	1. 60-1. 70	2. 00-2. 10	2. 40-2. 50		(701)
	(Less 5¢ commission on each record thru Haskell Faher)				
Sam Ricklin in the record business	(10¢ to 20¢ approximately lower than could be bought from regular distributors)				

The phonograph records purchased by Appellant as reflected in Chart No. 1 were the same records which Appellant sold to other distributors as set forth in Chart No. 2 [R. T. pp. 547-564; 1174-1194].

Thus, it can be seen that in no instance did Appellant sell the records that he purchased for profit. Even Appellant Fineberg at trial could not cite one instance when he sold records for a profit.

Two purchasers of Appellant, George D. Hartstone and William E. Cohan observed evidence that the phonograph records purchased by them originally came from the victimized distributors [R. T. pp. 625-673], even though Appellant took great care to instruct his employees to remove any such labeling from record cartons [R. T. pp. 668-670; 779-781].

The Government presented evidence with respect to Appellant's involvement in a prior similar scheme to defraud during the year 1962 in Albuquerque, New Mexico. In this scheme, Appellant operated the M. & C. Sales Corporation and used the assumed name, Jack Ross [R. T. p. 794]. Thomas E. Heald, who operated the Heald Supply Company testified that he did business with the M. & C. Corporation from April through August 1962, and Appellant was identified as the individual whom Heald knew to be Jack Ross, Manager and owner of the M. & C. Corporation [R. T. pp. 813-814]. Heald was first contacted by telephone and letter [R. T. p. 815]. Ross requested merchandise on an open line basis, but since credit information was not available, payment

was to be made on a C. O. D. arrangement with the understanding that if Appellant's bills were paid monthly, Heald would attempt to establish a line of credit for Ross [R. T. p. 816].

The picture is clear: The Government proved that Appellant Fineberg sold merchandise at consistently lower prices than that for which he was purchasing said merchandise.

Under these circumstances, Appellant could not expect to make full payment to his creditors. Indeed he never intended to make full payment for his purchases. Appellant succeeded in defrauding creditors of more than \$230,000.00, just as he defrauded others through the purchase and sale of identical merchandise through the operation of M. & C. Sales Corporation. Simply stated, Appellant purchased phonograph records and "dumped" these very records on the market as quickly as he could for whatever possible price Appellant could most easily obtain with the intent never to pay the distributors for said merchandise.

IV

ARGUMENT

- A. EXHIBITS OF THE GOVERNMENT CONSISTING OF BUSINESS RECORDS OF THE CORPORATION, MERCO SALES, WERE PROPERLY ADMITTED IN EVIDENCE; THE FIFTH AMENDMENT PRIVILEGE AGAINST INCRIMINATION MAY NOT BE CLAIMED BY A CORPORATION.
-

Apparently, it is contended that Appellant's Fifth Amendment privilege was violated in that he was required to produce to the grand jury the business documents of Nelson Bureau of Employment, a corporation doing business as Merco Sales. Appellant suggests that the Fifth Amendment privilege should be applied to persons who conduct business operations through small corporations [See Appellant's opening brief, p. 63]. However, the law runs contrary to this contention. Although one is protected by the self-incrimination privilege of the Fifth Amendment against the compulsory production of his private books and papers, this privilege does not extend to the books of the corporation which are in his possession. Furthermore, physical custody of incriminating documents does not protect the custodian against their compulsory production. See Wilson v. United States, 221 U. S. 361 (1911). In Wilson the Supreme Court had occasion to consider this rule as it relates to private corporations, and the Court said:

"What then is the status of the books and papers of a corporation, which has not been created

as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. . . ."

Appellant cites the dissenting opinion in Wilde v. Brewer, 329 F. 2d

924 (9th Cir. 1964) in support of his contention. However, the majority opinion relies upon Wilson v. United States, supra, and the similar holding of the United States Supreme Court in Grant v. United States, 227 U.S. 74 (1912).

Appellant also suggests that the case of Wilde v. United States, 362 F.2d 206 (9th Cir. 1966) also gives support to his cause. However, that case deals with the enforcement of an Internal Revenue summons under 26 United States Code, Section 7206, and merely holds that before such a summons will be enforced, it must be shown that the Internal Revenue investigation is being conducted for a legitimate purpose. Even that case holds that the fact that evidence might be gathered for a criminal prosecution would not render the summons unenforceable if it were shown that other legitimate purposes for the investigation existed. Clearly, the law does not give to Appellant Fineberg the privilege to withhold from the grand jury the documents of Merco Sales, a corporation.

It is further contended that the corporate documents in question were obtained by the Government through threats, coercion and duress [see appellant's opening brief, pp. 60-61]. We must first commence with the assumption that the Grand Jury had a right to subpoena and obtain the corporate records in question pursuant to the above cited case authorities. It should be further noted that the same contention now made was raised at the District Court level [C. T. pp. 27-47]. In an affidavit filed by Appellant with the Court in connection with a Motion for the Suppression

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Appellant also suggests that the case of Wilde v. United States, 362 F.2d 206 (9th Cir. 1966) also gives support to his cause. However, that case deals with the enforcement of an Internal Revenue summons under 26 United States Code, Section 7206, and merely holds that before such a summons will be enforced, it must be shown that the Internal Revenue investigation is being conducted for a legitimate purpose. Even that case holds that the fact that evidence might be gathered for a criminal prosecution would not render the summons unenforceable if it were shown that other legitimate purposes for the investigation existed. Clearly, the law does not give to Appellant Fineberg the privilege to withhold from the grand jury the documents of Merco Sales, a corporation.

It is further contended that the corporate documents in question were obtained by the Government through threats, coercion and duress [see appellant's opening brief, pp. 60-61]. We must first commence with the assumption that the Grand Jury had a right to subpoena and obtain the corporate records in question pursuant to the above cited case authorities. It should be further noted that the same contention now made was raised at the District Court level [C. T. pp. 27-47]. In an affidavit filed by Appellant with the Court in connection with a Motion for the Suppression

of Evidence [C. T. pp. 27-47]. Mr. Fineberg suggested that he was a commission man associated with the Nelson Bureau of Employment and had no title or position of significance with that corporation [C. T. p. 45]. Thus, though the dissenting opinion in Wilde v. Brewer is not the law of this circuit, it would appear that appellant has taken himself out of the special circumstances described by Judge Madden in his opinion wherein it was contended in the Wilde case that the sole owner of the corporation should be entitled to claim the Fifth Amendment privilege. Appellant has not made a claim that he was so closely associated with Merco Sales so as to fall within the exception that Judge Madden would have had the court accept as the law.

With respect to the allegations and suggestions that Government counsel acted improperly during Grand Jury proceedings in obtaining the corporate documents involved, it should be noted that Counsel for the Government produced the pertinent Grand Jury minutes for an in camera inspection by the court on March 14, 1966 [R. T. p. 33]. Thereafter, on March 23, 1966, having had the opportunity of reviewing this Grand Jury testimony, the Court denied Appellant's motion to suppress the business documents [R. T. p. 36].

Clearly, there is no merit to Appellant's challenge as to the admissibility in evidence of these corporate business documents on any legal ground.

B. EVIDENCE OF A PRIOR SIMILAR SCHEME TO DEFRAUD OTHER RECORD DISTRIBUTORS WAS PROPERLY ADMITTED AS BEARING ON THE ISSUE OF APPELLANT'S INTENT.

The Government presented evidence with respect to Appellant's involvement in a prior similar scheme to defraud during the year 1962 in Albuquerque, New Mexico. In this scheme, Appellant operated the M. & C. Sales Corporation and used the assumed name Jack Ross [R. T. p. 794]. Thomas E. Heald, who operated the Heald Supply Company testified that he did business with the M. & C. Corporation from April through August 1962, and Appellant was identified as the individual whom Heald knew to be Jack Ross, Manager and owner of the M. & C. Corporation [R. T. pp. 813-814]. Heald was contacted by telephone and letter [R. T. p. 815]. Ross requested merchandise on an open line basis, but since credit information was not available, payment was to be made on a C.O.D. arrangement with the understanding that if Appellant's bills were paid promptly, Heald would attempt to open a line of credit [R. T. p. 816].

Phonograph records were shipped to M. & C. Sales Corporation by Heald from between July 10, 1962 and August 22, 1962 [R. T. p. 818]. After receiving a financial statement concerning the M. & C. Sales Corporation, a line of credit was allowed by Heald [R. T. p. 818]. In mid-August, 1962, Heald received two post-dated checks from the M. & C. Sales

Corporation, after which large orders of records were shipped to M. & C. [R. T. p. 819]. As a result of post-dated checks being returned to Heald Supply Company by reason of non-sufficient funds, that company suffered a loss of \$56,783.00 [R. T. pp. 821-822]. Records were purchased by Appellant from Heald as follows: 2.08 for \$3.98 retail records; 2.59 for \$4.98 retail records; and 3.24 for \$5.98 retail records [R. T. p. 823]. Heald further testified that he did not ship the last large orders to M. & C. Sales Corporation until the aforementioned post-dated checks had been received [R. T. p. 837].

Ivan B. Conwell, owner of the Conwell Distributing Company of El Paso, Texas, also did business with M. & C. Sales Corporation in 1962 [R. T. pp. 480-481]. Conwell, too, identified Appellant Fineberg as the individual with whom he did business and whom he knew as Jack Ross [R. T. p. 841]. After meeting and talking with Appellant, two shipments of phonograph records were sent to M. & C. Sales Corporation valued at \$9,900. Payment was never received by Conwell [R. T. p. 843], although the agreement between Conwell and Appellant had been for payment to be made within ten days from the date of shipment of phonograph records [R. T. p. 848].

Robert L. Tripp, President of the Albuquerque National Bank, testified that he met Appellant several weeks prior to April 6, 1962 [R. T. pp. 853-854] and that Appellant identified himself as Jack Ross. At that time Mr. Fineberg opened a commercial checking account at the bank in the name of M. & C. Sales

Corporation. Mr. Tripp testified that Appellant placed the signature of Jack Ross on a signature card from M. & C. Sales Corporation [R. T. p. 857].

Mary Joe Morse was employed by Appellant as a bookkeeper in the M. & C. Sales Corporation from May through August, 1962. She also knew Appellant as Jack Ross [R. T. pp. 874-875]. Morse recalls typing labels for B. & R. Record Company, in New York City [R. T. p. 879] as well as peeling labels and removing all printed matter from record cartons so that no point of origin would be shown on the cartons [R. T. p. 879]. Mrs. Morse also recalls that Appellant used the names Jack Ross and Paul Hager in telephone conversations while Appellant was requesting credit of negotiating for the purchase of records [R. T. p. 881]. Appellant directed her to prepare post-dated checks made payable to Heald Supply Company [R. T. p. 885]. At the end of August, 1962, Appellant told Mrs. Morse that he would be away for two or three days. Mrs. Morse did not again see Appellant until she testified in the District Court at trial.

Ellison C. Driggers also knew Appellant as Jack Ross. Mr. Driggers leased property to M. & C. Sales Corporation from April through August, 1962. According to Driggers, Appellant vacated the property without notice [R. T. pp. 911-914].

As the trial court noted, the above-mentioned evidence pertaining to Appellant's operation of the M. & C. Sales Corporation was offered by the Government as bearing on the issue of intent [R. T. pp. 920-921].

There is no question but that there exists a general rule that evidence of a defendant's previous misconduct or other criminal acts is inadmissible. In Stewart v. United States, 311 F.2d 109, 112 (9th Cir. 1962), the Court quoted with approval, the exception to this general rule as set out in Bracy v. United States, 79 U.S. App. D.C. 23, 142 F.2d 87, 88:

"However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof, or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive."

As this Circuit stated in Fernandez v. United States, 329 F.2d 899, 908 (9th Cir. 1964), this type of relevant evidence which tends to prove a general fact in the case is admissible even though the evidence shows that the accused committed another offense at a different time and place. See O'Dell v. United States, 251 F.2d 704, 707 (10th Cir. 1958); 7 Wigmore On Evidence, 3rd Edition, §216, pp. 712-718. See also the recent Ninth Circuit case approving Fernandez and Stewart: Head v. United States, 346 F.2d 194 (9th Cir. 1965). It should be noted that the Government has done far more in the instant case in showing a substantially similar scheme to defraud than what was offered and approved by this Court in Fernandez, supra.

C. THE EXPERT TESTIMONY PROFFERED BY APPELLANT WAS PROPERLY EXCLUDED AS BEING CONFUSING, OF LITTLE POTENTIAL HELP TO THE JURY AND NOT RELATED TO A SUBJECT BEYOND COMMON EXPERIENCE SO AS TO REQUIRE EXPERT TESTIMONY.

Appellant Fineberg in testifying in his own behalf, stated that had he been given free merchandise, proper credit terms and extensions of extra discounts as were accorded to other large distributors, that he would have succeeded in conducting a successful business [R. T. p. 1111]. This was Appellant's contention although the evidence was overwhelming to the effect that Appellant had not been promised free merchandise or other credit terms,

than those agreed upon by Appellant and victimized distributors and, of course, Appellant did not during his direct or cross-examination, show one transaction wherein he had sold phonograph records for more than he had purchased them. To support the proposition that notwithstanding this unique approach to business development, Appellant would some day show profits as a result of his newest business venture, Merco Sales. Joseph Segal, a certified public accountant, was called as an expert witness on behalf of the defense [R. T. p. 1016].

Segal was offered as a witness to prove that it would be possible for a distributor of records to sell at a loss for a period of time and still expect to succeed in business by taking advantage of special terms of payment and credit which would be allowed a volume buyer [R. T. p. 1067]. This optimistic result would be dependent upon Appellant's testimony regarding his receipt of free records and greater discounts [R. T. pp. 1102-1105].

There was, however, no evidence which would support the theory that Appellant was to receive such advantageous purchasing arrangements. Rather, testimony was clear that each victimized distributor had very definite payment arrangements with Appellant, settled upon by agreement with Appellant during his initial contacts with the distributors [R. T. p. 180].

The opinion of a witness qualified as an expert is admissible into evidence whenever the jury, on the basis of its common knowledge and common understanding, is unable to bridge the gap of causal relation between the facts before it and the conclusions

to be drawn, without the technical assistance of one with special experience or education in the particular field. Francis v. Southern Pacific Co., 162 F.2d 813, 817 (10th Cir. 1947). Where, on the other hand, the matter at issue is the subject of common knowledge, even though there may be experts in the field, their testimony is not admissible. Schmieder v. Barney, 113 U.S. 645, 648; Salem v. United States Lines Co., 370 U.S. 31, 35; Coca Cola Co. v. Joseph C. Wirthman Drug Co., 48 F.2d 743, 746 (C.A. 8, 1931); Francis v. Southern Pacific Co., supra; Henkel v. Varner, 138 F.2d 934, 935 (C.A. D.C. 1943); Riley v. United States, 225 F.2d 558, 559 (C.A. D.C. 1955).

In Schmeider, the Supreme Court over seventy-five years ago said in upholding the exclusion of testimony by mercantile experts on the question of whether one type of merchandise was "goods of similar description" to another type of merchandise:

"The effort was to put the opinion of commercial experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. This it was decided in Greenleaf v. Goodrich could not be done. . . ." (Emphasis added).

In Salem, the Supreme Court recently reiterated that expert testimony is properly excluded:

"[I]f all the primary facts can be accurately and intelligibly described to the jury, and if they,

as men of common understanding, are as capable of
comprehending the primary facts and of drawing
correct conclusions from them as are witnesses
possessed of special or peculiar training, exper-
ience, or observation in respect to the subject under
investigation. . . ." (Emphasis added).

In Coca-Cola Co., plaintiff sought to offer expert testimony that, based upon analysis, defendant's soda had a different percentage of ingredients than did plaintiff's and hence was spurious. The percentage of the different ingredients in defendant's soda was given, and it was stated whether each percentage was higher or lower than in plaintiff's. The percentage of ingredients in plaintiff's soda was withheld, however. The Eighth Circuit upheld the rejection of this testimony, saying:

"If the differences or similarities are such that an ordinary man may observe, there is no reason why the trier of fact should not make the comparison, and, independently therefrom, reach the conclusion Where all the facts upon which a determination is based can be placed before the trier of fact and proper deduction of the determination therefrom does not require special training to adequately understand the significance of the facts, the determination thus made is a 'conclusion' within the meaning of the rules of

evidence, and as such, is not admissible. The vice of such evidence is accentuated where such conclusion is of an ultimate fact to be determined by the trier of fact." (Emphasis added).

Finally, in Francis, the Tenth Circuit said:

"The opinion of a witness qualifying as an expert is not admissible in evidence where the question for determination by the jury depends entirely on common knowledge and common understanding, and no special training or experience is required for its correct decision. In a case of that kind the jury is equally competent with the expert to weigh and appraise the evidence and to draw conclusions from it, and therefore expert testimony should be excluded." (Emphasis added).

Expert opinions which are unsupported by fact can only represent personal, unsubstantiated value judgments which have no standing as evidence. Atlantic Life Insurance Co. v. Vaughn, 71 F.2d 395, 39 (C. A. 6, 1934). Such opinions do not constitute a step on the road to truth for they are not probative of anything except the personal feelings of the witness. If characterization or value judgments are to be made, the jury has both the ability and the duty to make them. Coca Cola Co. v. Joseph C. Wirthman Drug Co., supra. In short, then, an expert opinion is not admissible

in evidence when its factual foundation is nebulous. United States v. American Tobacco Co., 39 F. Supp. 957 (E. D. Ky. 1941).

Mr. Segal's proffered testimony was based upon facts not pertinent to this case. His belief that it would be possible for one to show profit was based upon the assumption that Appellant would be able to take advantage of liberal discounts and one-hundred percent return privileges [R. T. pp. 1039-1040]. Such facts did not exist here and, therefore, the admission of such testimony would have been confusing, and misleading to the jury.

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stephen D. Miller

STEPHEN D. MILLER

10-251037
NO. 21287 ✓

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Appellee.

APPELLEE'S BRIEF

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CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Francis Jacob Young, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on January 12, 1966. The two-count indictment was brought under Title 18, United States Code, Section 474, and charged that on or about January 4, 1966, in Los Angeles County, the appellant and co-defendant Clarence Emmett Harrison possessed and transferred approximately 2150 counterfeit \$10 federal reserve notes.

On February 9, 1966, the case proceeded to trial before the Honorable Irving Hill. On February 10, 1966, both defendants were found guilty on both counts of the indictment.

Appellant's Notice of Appeal was timely filed [C. T. 45]. 1/

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 474, 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 18, United States Code, Section 474 provides in pertinent part as follows:

"Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United

1/ Refers to Clerk's Transcript of Record.

States by order of the proper officer thereof; or

"Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

"Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States, or

* * *

"Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same;

"Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both."

III

QUESTIONS PRESENTED

- A. Was There Adequate Probable Cause to Place Appellant Under Arrest?
- B. Were the Counterfeit Federal Reserve Notes Obtained by Federal Agents by Means of a Search?
- C. Was Appellant Denied His Right to Counsel?
- D. Were Appellant's Admissions Adequately Corroborated So As To Be Deemed Trustworthy?

IV

STATEMENT OF FACTS

On January 3, 1966, Agent Frank Slocum of the United States Secret Service was made aware of a possible sale of counterfeit United States currency [R. T. 33]. ^{2/} Special Agent Pat Boggs advised Slocum that the Secret Service had received information that a Frank Young, described as being over six feet tall and around 250 pounds, was attempting to find a buyer for approximately \$20,000 worth of counterfeit \$10 federal reserve notes. The sale price for the counterfeit notes was to be approximately 25% of the face value of the currency [R. T. 34]. The Secret Service was also told that Frank Young had previously been in trouble for violating the Gold Reserve Act and was either on parole

^{2/} Refers to Reporter's Transcript of Record.

or probation [R. T. 34]. Agent Slocum had previously participated in an arrest of Frank Young for violation of the Gold Reserve Act for which offense Young was convicted.

Agent Slocum proceeded to telephone the United States Probation Office in an attempt to find Frank Young's address. Slocum learned that the Probation Office hadn't heard from Young since the previous October [R. T. 35]. The investigation into the proposed sale involving Frank Young was never completed.

Later that same day, however, the Secret Service agents were made aware of another possible sale of counterfeit currency. Information was received by the Secret Service that there was a possible sale of approximately \$20,000 worth of \$10 notes for 25% of face value [R. T. 37]. The agents were told that Clarence "Slim" Harrison was offering the notes for sale to a Customs agent working undercover.

The next morning, at a meeting at the Los Angeles Police Department, the agents were advised that besides Harrison, there was an unknown person who might be involved, a Mr. X, the supplier of the counterfeit money who might show up during the sale. The agents were advised that the supplier, however, didn't want to meet the purchasers [R. T. 44]. At this time all of the agents and officers present were shown a photograph of the Frank Young known to Agent Slocum [R. T. 39]. The agents were told that information regarding another sale of counterfeit currency involving a Frank Young had been received and that the same amount of money seemed to be involved and the same denomination

had been mentioned.

At this meeting it was learned that the sale of the counterfeit currency was set to take place at approximately 4:30 P. M. , at the Bank Cafe in San Pedro. The agents learned of the time and place of the transaction at approximately 1:30 P. M. [R. T. 168]. The agents knew that the transaction would involve actual counterfeit currency because earlier that morning Agent Miller had examined three sample notes supplied by Slim Harrison and determined that they were in fact counterfeit [R. T. 177].

During the meeting it was decided that an agent who did not know Frank Young should be placed inside the Bank Cafe to observe the transaction. Agent Ernest Luzania was picked to be inside the cafe specifically because he was not known to Frank Young [R. T. 40].

After the meeting at the Police Department all of the participating agents and officers held a final meeting at the Jumping Jack restaurant in Torrance. Details of the transaction and of arrest procedures were discussed and all agents were again shown a photograph of Frank Young [R. T. 181-182].

Agent Luzania entered the Bank Cafe in San Pedro at approximately 4:30 P. M. [R. T. 85]. Luzania sat at the bar as close to the old bank vault as possible so that he could observe any transaction taking place inside [R. T. 88]. Luzania observed Harrison and Agent Verusio talking together. Luzania then observed Harrison take out a set of keys and open the vault [R. T. 86]. Harrison was followed into the vault by Agent Verusio and the undercover informer who had set up the transaction, Clarence

Baumgarten. While Baumgarten, Verusio and Harrison were talking together, inside the vault, appellant "walked in the side door of the cafe, and he looked around, and walked toward the front of the cafe, looked around again, and walked back out the side entrance." [R. T. 87].

Agent Luzania then observed Harrison place a brown package wrapped in foil on the counter. Harrison next picked up the package and handed it to Agent Verusio [R. T. 88]. Then all three men walked out of the vault. The package was under Agent Verusio's arm. A signal was then given that the delivery had taken place. Agent Luzania proceeded to place Harrison under arrest. After arresting Harrison, Luzania went out the side door, looked down the street and saw appellant Young standing down the street looking at the cafe [R. T. 88].

Agent Slocum entered the cafe upon the prearranged signal and was told by Agent Luzania that "Young came in, and he's across the street." [R. T. 45]. Luzania then pointed across the street towards appellant. Slocum looked across the street and saw appellant Young. Apparently appellant saw Agent Slocum and recognized him, for in Slocum's words, "he did a left flank and started walking west." Slocum ran across the street and placed appellant under arrest [R. T. 46]. Agent Slocum then brought appellant back into the cafe. Upon returning to the cafe, Agent Slocum told Agent Miller to advise appellant of his constitutional rights [R. T. 64]. Slocum then proceeded to advise Harrison of his constitutional rights [R. T. 46].

After receiving his constitutional admonition, Harrison was permitted to telephone his attorney, Mr. Harry Root who arrived at the cafe within a matter of minutes [R. T. 48]. After Mr. Root arrived Slocum gave him the U. S. Commissioner's phone number and Root telephoned him.

When Agent Miller entered the cafe he feined an arrest of Agent Verusio and took the package from under Verusio's arm, later determined by him to contain \$21,550 in counterfeit \$10 bills [R. T. 187]. Miller then proceeded to thoroughly advise appellant of his constitutional rights according to Escobedo v. Illinois, 378 U.S. 478 (1963) [R. T. 192].

After being advised of their constitutional rights both defendants were then transported to the county jail where they remained overnight. The defendants did not leave the Bank Cafe until after 5:00 P. M. [R. T. 97].

At 9:30 A. M. , the next morning, January 5, 1966, Agent Miller transported appellant from the county jail to the U. S. Court House. Miller again advised appellant of his constitutional rights [R. T. 197]. Miller asked appellant if he fully understood his rights, and appellant replied that he understood them [R. T. 217]. Appellant then went through the booking process in the Secret Service Office. After being booked appellant was taken before the United States Commissioner at shortly after 10:00 P. M. Appellant was again advised by the Commissioner of his constitutional rights according to Escobedo. Additionally, appellant was advised that if he could not afford an attorney one would be appointed for him

[R. T. 216].

Immediately after the Commissioner's hearing appellant was taken to the United States Marshal's Office. During a 10 to 15 minute conversation in the Marshal's Office, appellant Young told Agent Miller that he first learned of the counterfeit notes in August of 1966, but that he didn't see them until Christmas Day. Appellant further stated that he aged the notes by placing them in a tumbler with certain chemicals and some old rags. Young said he then took the notes to Harrison for safe-keeping. He said that he originally planned to buy gold with the genuine currency he would receive from the sale of the counterfeit currency [R. T. 205-206].

V

ARGUMENT

A. THERE WAS MORE THAN ADEQUATE PROBABLE CAUSE TO ARREST APPELLANT.

At the time that appellant was placed under arrest Agent Slocum was aware of the following facts and circumstances:

1. On January 3, 1966, the Secret Service was made aware of a possible sale of counterfeit currency.
2. The amount of counterfeit currency was said to be approximately \$20,000 worth of \$10 bills.
3. The asking price was said to be approximately \$5,000.

4. A Frank Young was reported to be the individual offering the notes for sale.

5. Frank Young was described as over six feet tall and around 250 pounds, and was said to have been in trouble previously for violation of the Gold Reserve Act.

6. Agent Slocum had previously arrested Frank Young on the Gold Reserve Act charge and was aware of his prior conviction for that offense.

7. The Secret Service was later that same day made aware of another sale of approximately \$20,000 worth of counterfeit \$10 notes. The asking price again was approximately \$5,000.

8. The Agents were advised by Agent Verusio that a Mr. X, the supplier of the counterfeit money, might show up on the premises during the sale but that he didn't want to meet the purchasers.

9. All participating agents were shown a photograph of Frank Young and alerted to the possibility that he was probably Mr. X, the supplier.

10. During the actual sale of the counterfeit currency between Agent Verusio and Clarence Harrison, appellant did in fact walk into the Bank Cafe, walk toward the front of the cafe, look around again, and walk out the side entrance.

11. After the sale had been consummated, appellant was seen to be standing on the sidewalk across the street from the Bank Cafe.

Clearly these facts and circumstances were within Agent

Slocum's knowledge at the time that he placed appellant under arrest and were more than adequate to warrant him in the belief that appellant was the supplier of the counterfeit currency.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

Brinegar v. United States, 338 U.S. 160, 175 (1949).

More recently the Supreme Court has articulated the constitutional standard of probable cause in the following language:

"Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

Beck v. Ohio, 379 U.S. 89, 91 (1964).

At the time that the agents went to the Bank Cafe in San Pedro, they anticipated that a Frank Young, over six feet tall and around 250 pounds, would show up on the premises during the

course of a transaction involving the sale of \$20,000 worth of counterfeit currency. All of the pre-conditions which Agent Slocum anticipated came to pass when appellant did in fact arrive upon the scene. There was more than adequate probable cause to arrest appellant as the supplier of the counterfeit notes.

Draper v. United States, 358 U.S. 307 (1959).

**B. THE COUNTERFEIT FEDERAL RESERVE
NOTES INTRODUCED WERE NOT THE
PRODUCT OF A SEARCH.**

Appellant makes the argument that there was a "search" and "seizure" which produced the counterfeit federal reserve notes. There is nothing in the record to sustain this position.

The record does, however, reveal what Judge Hill found to be a voluntary turn-over of the counterfeit currency to Agent Verusio by co-defendant Harrison [R. T. 278]. Agent Luzania testified that he observed co-defendant Harrison hand the package containing the counterfeit currency to Agent Verusio [R. T. 88]. Agent Verusio testified that co-defendant Harrison was the one who actually ripped open the package so that Verusio could have Baumgarten count the money to determine whether the proper amount was present [R. T. 142]. The package was actually taken by Agent Miller from under Agent Verusio's arm [R. T. 183]. The record is clear that there was in fact no search or seizure which produced the counterfeit currency. Co-defendant Harrison voluntarily turned over the package to undercover Agent Verusio, and appellant

should not now be heard to complain that co-defendant Harrison was deceived into believing that Verusio and Baumgarten were in fact bona fide purchasers of the contraband.

The voluntariness of the turn-over of the package containing the counterfeit currency is not vitiated because the undercover agent misrepresented his true identity and purpose. Nor was the agent's entry into the bar an unlawful intrusion -- as was recently held by the Supreme Court in Lewis v. United States, 384 U.S. 206, 211 (1966):

"But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car or on the street. A Government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the purposes contemplated by the occupant. "

Finally, appellant argues that a warrant should have been obtained to search the premises of the Bank Cafe; as has been argued above, no search was ever made. Even if there had been a search there is no rule of law requiring agents to procure a warrant, either an arrest or search warrant, for a crime not yet committed. The constitutional standard under the Fourth Amendment is one of reasonableness; there is no rule requiring a warrant

in all cases merely because there may be time to obtain one.

United States v. Rabinowitz, 339 U.S. 56 (1950).

C. APPELLANT WAS NOT DENIED
HIS RIGHT TO COUNSEL.

Appellant argues that he was denied his right to counsel by the Secret Service agents. Yet the record indicates, and appellant concedes (p. 22, Appellant's Brief), that appellant was given full Escobedo warnings before he made his damaging admissions. Furthermore, even though Miranda v. Arizona, 384 U.S. 436 (1966), is not applicable to the case at bar, see Johnson v. New Jersey, 384 U.S. 719 (1966), the United States Commissioner did in fact advise appellant of his constitutional rights in accordance with the more stringent requirements of Miranda [R. T. 216, 237, 270].

The record is clear that appellant was advised of his full constitutional rights on not one but three separate occasions. The record also indicates that Agent Miller inquired whether appellant understood his constitutional rights and appellant responded affirmatively that he did understand his rights [R. T. 217]. The record is barren of any indication whatsoever that appellant was coerced or compelled, physically or psychologically to make the admissions he did. Rather, we see the picture of a defendant who after having been made aware of his constitutional rights spontaneously acknowledges his guilt without force or compulsion or promise of reward.

Wong Sun v. United States, 371 U. S. 471 (1963);

Burke v. United States, 328 F.2d 399

(1st Cir. 1964);

United States v. Mitchell, 322 U. S. 65, 70 (1944).

The record fails to show that appellant at any time requested either the appointment of counsel or that counsel be present during his discussion with the agents. Appellant's admissions after being advised of his right to have appointed counsel indicates as clearly as anything could that he was desirous of waiving his right to counsel and spontaneously cooperating with the agents.

After three constitutional warnings Secret Service Agent Miller was not required to again advise appellant of his rights in the United States Marshal's Office:

"The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way. "

Miranda v. Arizona, supra, at p. 477.

See also: Good v. United States, No. 21,062 (9th Cir.

May 31, 1967), slip sheet opinion, and

Kaplan v. United States, No. 20,728 (9th Cir.

March 1, 1967), slip sheet opinion.

D. APPELLANT'S STATEMENTS WERE
ADEQUATELY CORROBORATED AS
TO TRUSTWORTHINESS.

After appellant had been thoroughly advised of his constitutional rights on three occasions he told Agent Miller that he had first learned of the counterfeit notes in question in August of 1966, but that he first saw the notes on Christmas Day of 1966. Appellant also related how he aged the notes by placing them into a tumbler and how he took the notes to co-defendant Harrison. Finally, appellant told Agent Miller what he planned to do with the proceeds from the sale of the counterfeit currency. Appellant's admissions thoroughly implicated him in the transaction between co-defendant Harrison and undercover agent Verusio. His admissions clearly indicated his participation in the transaction, his knowledge of the sale and his position as the supplier of the notes.

The question to be answered is, were these admissions corroborated so as to render them trustworthy? The federal rule as to the manner in which an admission must be corroborated is set forth in Opper v. United States, 348 U.S. 84 (1954), and Smith v. United States, 348 U.S. 147, 156 (1954). Basically the rule is that all of the elements of the crime charged must be established by independent evidence or corroborated admissions. The extent of the required corroboration is that there be evidence independent of the statements which tends to establish their trustworthiness.

"All elements of the offense must be established by independent evidence or corroborated

admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused. "

Smith v. United States, supra, at p. 156.

"The corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. "

Opper v. United States, supra.

A careful examination of the record discloses more than enough evidence, independent of appellant's admissions, to establish the trustworthiness of those statements. On January 3, 1966, Secret Service agents were told that a Frank Young, who had previously been in trouble for violation of the Gold Reserve Act was attempting to dispose of approximately \$20,000 worth of counterfeit \$10 notes for approximately \$5,000. Later the agents were made aware of the transaction between Harrison and undercover Agent Verusio. The similarity between the two transactions was undeniable; the same quantity of counterfeit \$10 bills for the same asking price. Also, it was known that Harrison's supplier may be present during the transaction.

Finally, appellant's brief appearance on the scene during the course of the transaction and his exit to a supposed place of safety across the street lend the final air of trustworthiness to his statements. It would be the height of folly to suppose that appellant just happened to arrive on the premises at the exact moment when the sale occurred unless he had been previously advised of this transaction which was set up on relatively short notice. Clearly, the evidence independent of appellant's admissions could have led the trier of fact to have concluded but one thing, that appellant was on the premises only because he was in fact the supplier of the counterfeit currency and that appellant's admissions were to be believed.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN

NO. 21295

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSVALDO LUGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OSVALDO LUGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California, adjudging appellant to be in violation of probation in a criminal case.

The original offense and the probation revocation proceeding occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231, 3651, and 3653, and Title 26, United States Code, Section 4724(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

On May 18, 1965, appellant entered a plea of guilty to a charge of importing approximately ten grams of heroin into the United States without registering and paying the special tax, in violation of Title 26, United States Code, Section 4724(a) [C. T. 4, 6]. ^{1/}

Thereafter, on August 13, 1965, appellant appeared before United States District Judge Fred Kunzel for sentencing and was committed to the custody of the Attorney General for three years and execution of the sentence was suspended with appellant being placed upon probation for a period of three years [C. T. 7].

On March 11, 1966, a hearing was completed upon an order to show cause why appellant's probation should not be revoked. The probationary order was revoked upon the same date, and appellant was then committed to the custody of the Attorney General for three years [C. T. 8].

Appellant subsequently filed a notice of appeal [C. T. 9-10].

III

ERROR SPECIFIED

Appellant has specified one point upon appeal:

"1. The Revocation of Probation by the District

^{1/} "C. T." refers to the Clerk's Transcript of Record.

Court amounted to an abuse of discretion, since the evidence is not sufficient to show that appellant violated any of the terms of his probation:

"(a) Since the testimony of Agent Miller as to the conversation between appellant and a codefendant should have been excluded:

"(1) Agent Miller was permitted to give his English translation of the conversation that took place in Spanish; this prejudiced appellant because he was unable to test the accuracy or inaccuracy of the translation, with the underlying Spanish words not remembered by the witness.

"(2) Agent Miller was permitted to testify after refreshing his recollection from an English translation, even though this refreshing did not cause him to remember the underlying Spanish words, but only the translation (which he had forgotten).

"(3) The inability of the Government to produce Agent Miller's original rough notes of this conversation (since they had apparently been destroyed) was a violation of the Jencks Act, and the testimony should have been stricken.

"(b) The coercion of the codefendant in appellant's first trial by the District Court was prejudicial to appellant in the second trial (notwithstanding the grant of appellant's motion for a new trial), since

appellant was unable (as a practical matter) to call the codefendant as a material defense witness in the second trial, as a result of the coercion."

(Appellant's Opening Brief, pp. 6-7.)

IV

STATEMENT OF THE FACTS

On May 18, 1965, appellant was convicted of importing approximately ten grams of heroin into the United States without payment of the special tax. On August 13, 1965, he was committed to the custody of the Attorney General for three years, execution was suspended, and he was placed upon probation for three years [C. T. 4, 6, 7].

The terms of probation were that appellant "obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that he not use barbiturates, marihuana or narcotics in any form, that he not associate with known users of or dealers in barbiturates, marihuana or narcotics in any form, and that he not enter Mexico nor approach the Mexican Border, and that he at his own expense submit to such tests as the Probation Department shall determine to determine his use of narcotics" [C. T. 7].

On February 2, 1966, appellant was convicted of aiding, abetting, etc., the smuggling of heroin; aiding, abetting, etc., the concealment, etc., of heroin; and concealing, etc., heroin.

These convictions followed trial in the United States District Court, San Diego, with Judge Kunzel presiding [R. T. 269, 276, 287]. ^{2/} An appeal from these convictions is now pending in this Court, No. 21162.

On March 4, 1966, a hearing commenced upon an order to show cause why appellant's probation should not be revoked. Judge Kunzel considered the evidence that was heard in the trial of the case that was completed on February 2, 1966 [R. T. 3, 7, 17-18]. ^{3/} The probationary order was revoked on March 11, 1966 [C. T. 8].

Rather than burden this Court with a lengthy recital of the evidence heard in the jury trial which ended in the convictions of February 2, 1966, appellee will follow the procedure adopted by appellant and incorporate by reference the Statement of the Facts appearing in Appellee's Brief filed in this Court in Case No. 21162, pp. 4-10.

^{2/} "R. T." refers to the "Reporter's Transcript on Appeal". Although there is a conflict between appellant's Designation of Record on Appeal [C. T. 13] and the Index to the Clerk's Transcript of Record, appellee joins in appellant's assumption that the record upon appeal includes all of the Reporter's Transcript in the appeal from Case No. 36120-SD-Criminal.

^{3/} There is a duplication of numbers in the Reporter's Transcript on Appeal. Any references in this brief to pages 1-20 of the Reporter's Transcript will refer to the proceedings of March 4 and March 11, 1966.

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT
ERROR IN THE TRIAL OF CASE NO.
36120-SD-CRIMINAL.

Appellant contends in this appeal, as well as the appeal in Case No. 21162, that the trial Court committed a number of errors in the trial of Case No. 36120-SD-Criminal, which trial resulted in appellant's convictions of February 2, 1966.

It is respectfully submitted that the trial Court committed no error by receiving the testimony of Officer Miller in Case No. 36120-SD-Criminal. Appellee's position is based upon each of the following reasons:

1. Miller testified from his existing memory, not from past recollection recorded [R. T. 149].
2. A witness may testify concerning the substance of a conversation and need not remember the exact words used in the conversation.
3. The fact that a witness has destroyed some notes does not require exclusion of his testimony under the facts of this appeal.

The alleged coercion of the co-defendant also did not involve error in Case No. 36120-SD-Criminal, for each of the following reasons:

1. The co-defendant was willing to testify for appellant

and could have done so with the inadmissible impeachment matter, if such existed, being excluded from the evidence.

2. Appellant failed to raise the issue in a timely fashion in the trial Court or at any time during the trial. He raised the question of coercion but did not raise the question now before the Court until nine days after the convictions [R. T. 79-80, 287, 290-91].

The above-mentioned contentions are discussed at greater length, with citation of authorities, on Pages 10-20 of Appellee's Brief in this Court in Case No. 21162.

B. ASSUMING, ARGUENDO, THAT THE TRIAL COURT ERRONEOUSLY RECEIVED OFFICER MILLER'S TESTIMONY, THIS DID NOT CONSTITUTE ERROR IN THE INSTANT APPEAL.

Assuming, for purposes of argument only, that Investigator Miller's testimony should not have been received in the criminal proceeding, error was not thereby committed in the probation revocation hearing, for each of the following reasons:

1. Miller's testimony was not required in regard to Count Four of the indictment, No. 36120-SD-Criminal, due to the statutory possession presumption under Title 21, United States Code, Section 174. Appellant had been in possession of the heroin alleged in Count Four [R. T. 111-12, 216-17], and he was convicted under that count, among others [R. T. 287]. This alone constituted a violation of

the terms of probation (i. e., "obey all laws . . . "). 4

2. The rules for ascertaining guilt in a criminal trial do not necessarily apply in a probation revocation hearing.

The procedure employed in a probation revocation hearing

rests within the broad discretion of the trial Court.

Bennett v. United States, 158 F.2d 412, 414

(8th Cir. 1946), cert. denied, 331 U.S. 822

(1947);

Jianole, supra, at 117.

In such a proceeding, the test is whether the evidence is sufficient to reasonably satisfy the judge that the conditions of probation have been violated.

Manning v. United States, 161 F.2d 827, 829

(5th Cir. 1947), cert. denied, 332 U.S. 792

(1947).

The violation need not be established by proof beyond a reasonable doubt.

Bernal-Zazueta, supra, Footnote 6 at p. 68;

Manning, supra, at 829.

4/ Of course, a criminal conviction would not be required in order to prove that the probationer violated the criminal law and thus violated conditions of probation.

Bernal-Zazueta v. United States, 225 F.2d 64, 68

(9th Cir. 1955);

Jianole v. United States, 58 F.2d 115, 117-18

(8th Cir. 1932).

The determination of whether or not probation should be revoked is governed by the exercise of sound discretion by the trial Court.

Burns v. United States, 287 U.S. 216, 221, 222
(1932);

Escoe v. Zerbst, 295 U.S. 490, 493 (1935);

Brown v. United States, 236 F.2d 253, 254
(9th Cir. 1956), cert. denied, 356 U.S. 922
(1958);

Reed v. United States, 181 F.2d 141, 142
(9th Cir. 1950), cert. denied, 340 U.S. 879
(1950).

The decision of the trial Court in a probation revocation proceeding will not be disturbed upon appeal in absence of an abuse of discretion.

Kirsch v. United States, 173 F.2d 652, 655
(8th Cir. 1949);

Manning v. United States, supra, at 829.

It was entirely proper for the trial Judge to consider the evidence that he had heard during appellant's previous criminal trial.

Bernal-Zazueta, supra, at p. 68.

This evidence showed that one Jose De La Rosa entered the United States from Mexico with approximately two ounces of heroin in his pocket [R. T. 98-99, 103, 139-40]. He also had a piece of paper containing appellant's last name and telephone number and the word,

"Important" (in Spanish) [R. T. 107]. De La Rosa arranged for a meeting with appellant [R. T. 174-77]. When the meeting occurred, appellant and De La Rosa had a conversation from which it would naturally be inferred that heroin was the subject of the discussion [R. T. 149-50, 152-54].

Appellant asked, "Is that all you could get?" De La Rosa answered that he had his part. De La Rosa asked, "Where is your kit?" Appellant stated that he did not have it with him and indicated that he was going home to "fix up" (take some narcotics) [R. T. 150, 153].

"Kit" is a word sometimes used to describe the paraphernalia used by a narcotics addict for the injection of heroin [R. T. 200].

Appellant was arrested with heroin in his pocket [R. T. 111-12].

In the subsequent probation revocation proceeding, it was alleged that appellant had violated his probation in connection with crimes involved in the sentence of February 11, 1966 [R. T. 5]. (The evidence in regard to the "kit" also showed a violation of California Health and Safety Code, Section 11555.)

The Court also noted that there was evidence of an intended use of narcotics [R. T. 8]. This alone would constitute a violation of probation. Although appellant distinguishes between "use" and "intended use", the distinction is not important. In Dillingham v. United States, 76 F.2d 35 (5th Cir. 1935), the defendant was charged with a violation of probation involving the fact that he was

a fugitive from justice. There apparently was no specific probationary condition prohibiting him from becoming a fugitive from justice. The Court of Appeals affirmed the judgment of revocation:

"It is enough that it be made sufficiently to appear that the probationer has not conducted himself in accordance with his duty as a probationer." (at p. 36).

Consequently, an intended use of narcotics would constitute a violation of probation in the instant matter.

Although appellant has raised some highly ingenious argument relating to admissibility of evidence, it is respectfully submitted that the trial Court did not abuse its discretion in the revocation proceeding.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON

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/

No. 21,296

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,	<i>Appellant,</i>
vs.	
KANO KAWAMURA, JAPANESE CONSUL- LATE, et al.,	<i>Appellees.</i>

APPELLANT'S OPENING BRIEF

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No. 21,296

**United States Court of Appeals
For the Ninth Circuit**

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA, JAPANESE CONSUL-
LATE, et al.,

Appellees.

APPELLANT'S OPENING BRIEF

JURISDICTION

This case is before the Court upon appeal from a decision of the United States District Court rendered on July 5, 1966. Judgment thereon was filed July 26, 1966. The decision of the District Court granted defendants' motion to dismiss on the basis that a period of one year had run from the date of the accident to the date of filing of the complaint in this action in the District Court. This Court has jurisdiction under 28 U.S.C. 1291.

was named as driver of the vehicle involved, and not described in any other particular fashion.

Kawamura was duly served, and on February 12, 1965, five and one-half months after the accident, he

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APPELLANT'S OPENING BRIEF

STATEMENT OF FACTS

On September 1, 1964, plaintiff and appellant, Anna L. Sanchez, while a pedestrian in San Francisco, California was struck by an automobile. The auto was operated by defendant and appellee, Kano Kawamura.

Sixteen days later, on September 17, 1964, Sanchez filed an action for personal injuries in the Superior Court for the City and County of San Francisco, naming Kawamura as a defendant. Her pleading was a general form negligence complaint, and nowhere therein was Kawamura identified as a vice-consul; he was named as driver of the vehicle involved, and not described in any other particular fashion.

Kawamura was duly served, and on February 12, 1965, five and one-half months after the accident, he

filed his answer. It was a general form answer, raising ordinary negligence defenses. His answer neither attacked the jurisdiction of the Superior Court, nor identified him in any way as vice-consul of Japan.

On June 10, 1965, depositions were taken in that matter, and Kawamura testified to his vice-consular status. Thereafter, in October, 1965, more than one year after the accident, appellee moved the California court for dismissal of the action; his grounds were lack of jurisdiction. At the present time, that motion remains off calendar.

On November 26, 1965, appellant filed the within action in the United States District Court. That complaint identified appellee as vice-consul of Japan in order to show jurisdiction in the Federal Court. Other than that, it was a standard form personal injury complaint, based on negligence. Inadvertently, it alleged nothing of the prior state court proceedings.

Kawamura moved for dismissal of the Federal Court complaint on the grounds that the California statute of limitations (one year) was applicable. The matter was argued on that question, with appellant taking the position that laches should apply. The District Court granted the motion for dismissal on July 5, 1966.

Judgment thereon was filed July 26, 1966. Notice of Appeal was filed and this appeal followed.

Pending this appeal, appellant directed a motion to the District Court asking that the judgment of dismissal be set aside and that she be permitted to file an

amended complaint, setting up the prior timely state court proceedings. That motion was denied and notice of appeal from that denial has been filed. Although no request for consolidation on appeal has been filed as yet, appellant intends to do so as soon as the transcripts on appeal are complete and filed. Therefore, appellant prepares this brief on the theory that the matters will be consolidated into one appeal and that all points involved can be argued.

ARGUMENT

A. THE MOTION FOR RELIEF UNDER RULE 60-B OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS TIMELY FILED AND WAS PROCEDURALLY CORRECT.

I

The motion was filed within one year of the Order of Dismissal.

Federal Rules, Civil Procedure, Rule 60-B;

Bookout v. Beck, 354 F. 2d 823, 825 (1965, C.A. 9).

II

The procedure followed, applying preliminarily to the District Court for relief from the Order of Dismissal, pending appeal, before applying to the Court of Appeals for a remand, has been approved by your Honorable Court.

Greear v. Greear, 288 F. 2d 466 (1961, C.A. 9);

Creamette Co. v. Merlino, 289 F. 2d 569 (1961, C.A. 9).

**B. THE MOTION FOR RELIEF SHOULD HAVE BEEN GRANTED;
IT WAS AN ABUSE OF DISCRETION TO FAIL TO ALLOW
THE FILING OF AN AMENDED COMPLAINT.**

I

Concededly, such a motion is addressed to the sound discretion of the trial court, and that court's ruling will not be ordinarily disturbed on appeal without a showing that its discretion has been abused.

Gunther v. San Diego and A.E. Ry. Co., 336 F. 2d 543, 549 (1964, C.A. 9); reversed on other grounds, 382 U.S. 257 (1965).

II

Here, however, where the state court action was filed within a month of the accident, and where the defendant filed an answer within four and one-half months of the accident, defendant cannot [claim] he is suffering detriment. The purpose of the statute of limitations, the prevention of stale claims, cannot be served by allowing the dismissal of this action, and also the state court action, on the grounds of lack of jurisdiction. Unless the motion for relief under 60-B is granted, this Court cannot make a full consideration of all of the problems involved. Without the record being amplified to include the allegations with respect to the state court proceedings, this Court cannot consider all of the factors in this case, nor can it achieve substantial justice.

(a) The facts with respect to the prompt filing and service of the state court action, the answer thereto, and the discovery proceedings therein, are unrebutted.

Obviously, defendant had ample and timely notice of plaintiff's claim.

(b) The ineptly pleaded complaint, originally filed in the District Court, fails to allege the state court proceedings, including the discovery proceedings. It is a bare statement of a cause of action, and on its face shows that it was filed some fourteen months after the accident. The narrow legal issue presented by the motion to dismiss that complaint—i.e., whether or not the one-year California statute of limitations applies, or whether laches should be applied—is a far different matter from the issues truly involved in the case and which must be considered in order to provide substantial justice.

(c) Where no reason appears for the denial of the relief requested, and where no damage can flow to the other party by granting said relief, it is an abuse of discretion to deny the relief.

United States v. Backofen, 176 F. 2d 263 (1949, C.A. 3).

“An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.”

Virginian Ry. Co. v. Armentrout, 106 F. 2d 400, 408 (1948, C.A. 4).

“Abuse is ordinarily established by showing that the trial court acted without authority, (citing cases) . . . for an erroneous reason (citing cases) . . . or arbitrarily and without justification in the light of all the circumstances as shown by

a review of the record as a whole . . .". (Emphasis added)

Somerville v. Capital Transit Co., 192 F. 2d 413, 414 (1951, C.A. D.C.).

"Although the granting of a continuance or of motions for vacation of judgment and for new trial are addressed to the discretion of the trial court, that discretion must be exercised in the interest of justice."

Cornwell v. Cornwell, 118 F. 2d 396, 398 (1941, C.A. D.C.).

C. THE PROPOSED AMENDED COMPLAINT STATES A CAUSE OF ACTION, NOT BARRED BY THE STATUTE OF LIMITATIONS.

I

On the face of the state court complaint, the California court had jurisdiction of the parties and the subject matter. On the face of the answer, that jurisdiction remained. The answer failed to raise the jurisdictional issue or any immunity issue, and, in fact, did not define or point out in any way the vice-consular status of Mr. Kawamura.

Constitution, State of California, Article VI, Section 5.

II

State courts have been held to have actual jurisdiction over matters involving vice-consuls as defendants.

Domestic relations and probate matters have been excluded from the effect of the section.

Ohio Ex. Rel. Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154 (1930);

Urdanetta v. Urdanetta, 37 N.Y.S. 2d 601 (1942).

And where the defendant consul or vice-consul has defaulted, or failed to raise the question before judgment is rendered, the state court jurisdiction has been upheld.

Gonzalez v. Wagner, 64 F. Supp. 737 (1946, D.C., S.Dist.Tex.);

Bliss v. Nicolaif, 79 N.Y.S. 2d 63 (1948);

Koppel v. Heinrichs, 1 Barb. 449 (1847, N.Y.);

Hall v. Young, 20 Mass. 80 (1825).

III

Plaintiff here has not "slept on her rights", as the traditional ban on stale claims has often been expressed. While defendant may not be able to waive jurisdiction, or might be immune from the doctrine of estoppel to assert jurisdiction, he certainly has the power to waive the defense of statute of limitations, and his conduct in this case would appear to be such a waiver. Defendant not only filed an answer in the state court, but took part in discovery proceedings.

IV

It would seem logical that if the state court has jurisdiction against a vice-consul who defaults, it

would have apparent jurisdiction against a vice-consul who answers and does not raise the jurisdictional issue. Its jurisdiction has been upheld where he stipulates to judgment.

Gonzalez v. Wagner, 64 F. Supp. 737 (1946, D.C., S.Dist.Tex.).

V

On the facts of this situation, with the timely state court filing, and with the delay in the raising of the jurisdictional issue, the state court had actual or apparent jurisdiction up to the time the motion to dismiss was submitted thereto. Thus, the statute of limitations should be tolled by the state court filing. To hold otherwise under this fact situation would be to ignore the reason for the statute of limitations as a defense, and to perpetrate a manifest injustice. Certainly, this plaintiff, or other plaintiffs so situated, might well be totally entrapped by the lack of knowledge that the defendant happened to be entitled to vice-consular immunity from state court suit.

The Supreme Court of the United States has repeatedly held that the statute of limitations should be tolled in situations where the action was filed in the wrong court and later dismissed. They have not so ruled in a case involving absolute lack of jurisdiction, but, as indicated above, this is not a case of absolute lack of jurisdiction.

Burnett v. New York Central Railroad Co., 380 U.S. 424, 85 S.Ct. 1050 (1965);

Herb v. Pitcairn, 325 U.S. 77, 65 S.Ct. 954 (1945);

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962).

D. EVEN ON THE BASIS OF THE EXISTING PLEADING, ASSUMING THE AMENDED PLEADING IS NOT ALLOWED, LACHES SHOULD BE APPLIED IN THIS CASE RATHER THAN A STATE STATUTE OF LIMITATIONS.

The statutory requirement that actions against a vice-consul be brought in the Federal Court (28 U.S.C.A. 1351) creates an immunity from state court suit that is not based on international law.

Anderson v. Villela, 210 F. Supp. 791, 792 (1962, U.S.D.C., Mass.).

The purpose of the statute is to provide uniform treatment for vice-consuls and consuls of foreign states. In our case, the District Court, in the body of its Order of Dismissal, dated July 5, 1966, put the problem precisely. It said, at page 2 thereof:

“Neither the reported cases nor the legislative history of Section 1351 offer a clear guide to the resolution of the problem now under consideration. This Court is therefore forced to choose between the applicable state law and a rule derived from principles of Federal common law.

“Although the advisability of uniform regulation of the officials of foreign sovereigns indicates the possible undesirability of applying principles of state law, . . .”.

The court then adopted the local statute of limitations on the theory that, in the absence of direction by

Congress, that is the acknowledged rule. However, it is respectfully submitted, that the purpose of this particular statute is not served by that application and that this statute should be uniformly applied to all suits against consuls or vice-consuls.

There are available, for comparison, applicable statutes of limitations imposed by Congress in federally created rights matters. Examples would be F.E.L.A. cases or Jones Act cases.

It should be carefully noted that the Federal Court, in a vice-consul case, is not "merely another court of the state" as referred to in *Holmberg v. Armbrrecht*, 327 U.S. 392, 66 S.Ct. 582 (1946). It is, per the statute, the only court that could hear the case.

SUMMARY

For the reasons set forth herein, it is respectfully submitted that if plaintiff's action is allowed to die, on the basis of failing to meet the bar of the statute of limitations, a manifest injustice will occur. As has been noted several times, defendant had ample notice of the claim and took active part in the defense thereof before the statute of limitations ran. It is respectfully submitted that the most appropriate vehicle to reach a just result would be to permit the filing of the amended complaint, and to hold that the defendant has waived the statute of limitations by his active role in the state court proceedings. In any event, he should not be allowed to prevail on the basis of an unduly limited record on appeal, without con-

sideration of the justice of the cause and the merits of the controversy.

Dated, San Francisco, California,

June 27, 1967.

Respectfully submitted,

LEVY, DERoy, GEFNER & VAN BOURG,

By VICTOR J. VAN BOURG,

By GEORGE DERoy,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE DERoy,

Attorney for Appellant.

No. 21,296

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA,

JAPANESE CONSULATE, et al.,

Appellees.

BRIEF FOR APPELLEES

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No. 21,296

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA,

JAPANESE CONSULATE, et al.,

Appellees.

BRIEF FOR APPELLEES

STATEMENT OF FACTS

Although this court has denied a motion to augment the record on appeal, appellant has included much matter, not part of this record, in her statement of facts. The facts appearing from the record before this court are simply these:

Appellant has filed a complaint alleging she suffered certain personal injuries on September 1, 1964, due to the negligence of appellee Kawamura, a vice-consul of Japan. Her complaint was filed on November 26, 1965, more than one year after the date of the accident. Appellee moved for a dismissal of the action on the ground that it was barred because it was not filed within one year after the accrual of the cause of action. The district court granted the motion. A judgment of dismissal was entered on July 26, 1966, and this appeal followed.

QUESTION PRESENTED

The question raised is whether California's one year statute of limitations applies to an action for personal injuries suffered in California which is brought against a vice-consul of a foreign country in federal district court.

ARGUMENT

- I. THIS ACTION IS ONE SEEKING TO ENFORCE RIGHTS AND DUTIES CREATED BY THE STATE OF CALIFORNIA, RATHER THAN ONE SEEKING TO ENFORCE A RIGHT CREATED BY FEDERAL STATUTE.**

Appellant's action lies within the exclusive original jurisdiction of the district courts. 28 USC §1351.

An examination of that code section shows that it does not purport to create any new right or cause of action. In the absence of the statutory provision, an action against a consul or vice-consul could be brought in a state court, because diplomatic immunity does not extend to such officials.

22 USC §252;

Auer v. Costa (D.C. Mass. 1938), 23 F. Supp. 22.

28 USC §1351 merely specifies in what court already existing "actions and proceedings" shall be tried. Its effect is similar to the "diversity" provision, 28 USC §1332. Each of these two sections confers federal jurisdiction because of the status of the parties involved. From the fact that 28 USC §1351 deals with certain official representatives of foreign states, it would seem that its purpose is the same as the pur-

pose behind the "diversity" provision; namely, "assurance to non-resident litigants of courts free from susceptibility to potential local bias."

Guaranty Trust Co. v. York, 326 U.S. 99, 111,
65 S.Ct. 1464, 1469.

In this respect, 28 USC §1351 must be distinguished from federal enactments which create new and distinct rights of action which did not previously exist, such as the Tort Claims Act, the FELA or the Jones Act.

The present action, being one for personal injuries incurred in California, is plainly one which arose under California law but which, for policy reasons, Congress has decreed shall be adjudicated solely in the federal courts.

II. WHEN ENFORCING RIGHTS OR DUTIES CREATED BY STATE LAW, FEDERAL COURTS APPLY STATE STATUTES OF LIMITATION.

When a federal court sits to decide a claim based on a right derived from state law, it applies state law regarding statutes of limitations and "if a plea of the statute of limitations would bar recovery in a State Court, a federal court ought not to afford recovery."

Guaranty Trust Company v. York, *supra*, 326 U.S. at 107, 65 S.Ct. at 1469.

Thus, the California one-year statute of limitations for personal injury actions is properly applicable to this action.

California Code of Civil Procedure §340(3).

III. THERE IS NO BASIS FOR APPLYING SOME OTHER STATUTE OF LIMITATIONS TO THIS ACTION.

Appellant chose, following the original ruling by the district court, to stand on her original complaint, and on her claim that the one-year statute was not applicable to that complaint. She designated as error the court's dismissal of that complaint. (Cl. Tr. pages 24-25.)

Appellant has not pointed out any policy reasons for not applying the one-year statute. If the policy behind 28 USC §1351 is, as appears, to afford consuls a forum free from potential local bias, that policy would be best effectuated by applying the same statute of limitations to them when sued for negligently-caused personal injuries occurring in California as would be applied to private persons sued on the same basis in California state courts. Certainly applying a longer limitations period to cases against defendant consuls than against private defendants would not carry out the purpose of the statute.

Of practical importance is the question, unanswered by appellant, of just what limitation period, if not one year, should be applied to cases against vice-consuls. Apparently appellant wants the period to remain indefinite, by applying only principles of laches. This would hardly result in equal treatment of consuls and vice-consuls on the one hand and private defendants on the other hand. It would, however, create uncertainty and confusion as to how long one had after the accrual of rights against consuls to file an action to vindicate those rights.

Appellant, citing "uniformity of treatment for vice-consuls and consuls of foreign states" as the purpose behind the statute, concludes that some single statute of limitations should be applied to all personal injury actions against consuls, no matter what state of the Union the cause of action arose in. In so concluding, appellant misconstrues the "uniformity" which is sought. The purpose is not to afford each consul the same treatment as every other consul, but rather to afford each consul the same treatment as would be afforded a private citizen sued on an identical cause of action. This uniformity of treatment, or perhaps more appropriately, equality of treatment, is achieved only by applying the same one-year statute of limitations to a personal injury action arising under California law against a consul or vice-consul as is applied to a personal injury action arising under California law against a private party.

SUMMARY

This is an action for personal injuries incurred in an accident which occurred in California. The complaint was not filed until more than one year after the cause of action arose. 28 USC §1351 requires that, because the action was against a vice-consul, it be brought in the district court. But the law applicable to the case is the law of California. In deciding cases arising under state law, federal courts apply to the action the statute of limitations which would be applied by the state under whose law the cause of action arose, in this case, one year.

The policy behind 28 USC §1351, to protect consuls and vice-consuls of foreign states from possible local bias, would not be effectuated by applying a one-year statute of limitations to personal injury actions against private parties, but applying an indeterminate laches period or some longer limitations period to actions against consuls and vice-consuls. The purpose behind 28 USC §1351 will be effectuated by upholding the district court's ruling that the statute of limitations applying to personal injury actions arising in any state against consuls is the same as the statute of limitations for actions arising in the same state against private persons.

Dated, San Francisco, California,
September 12, 1967.

Respectfully submitted,
SEDGWICK, DETERT, MORAN & ARNOLD,
By P. BEACH KUHL,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

P. BEACH KUHL,
Attorney for Appellees.

Nos. 21,296 and 22,183

United States Court of Appeals

For the Ninth Circuit

ANNA L. SANCHEZ,

VS.

KANO KAWAMURA,

Japanese Consulate, et al.,

Appellant,

Appellees.

APPELLANT'S OPENING BRIEF

ON CONSOLIDATED APPEALS

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Nos. 21,296 and 22,183

United States Court of Appeals For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

VS.

KANO KAWAMURA,

Japanese Consulate, et al.,

Appellees.

APPELLANT'S OPENING BRIEF ON CONSOLIDATED APPEALS

JURISDICTION

This case is before the Court upon appeals from decisions of the United States District Court rendered on July 5, 1966, and May 1, 1967. The earlier decision of the District Court granted defendants' Motion to Dismiss on the basis that one year had run from the date of the accident, prior to the filing of the complaint; the second held that appellant had not shown cause for granting of relief under Federal Rule of Civil Procedure 60(b). The Federal Court has exclusive jurisdiction under 28 U.S.C. § 1351, because the defendant is vice consul of Japan.

STATEMENT OF FACTS

Appellant has previously filed a brief in No. 21296. The statement of facts therein is adopted and incorporated herein by reference. The following additional facts appear germane.

The appeal from the denial of the Motion to Set Aside the Judgment of Dismissal and for Leave to File an Amended Complaint has been docketed and filed under No. 22183. On motion of appellant, the two appeals have been consolidated.

The record of the trial court indicates that on February 16, 1966, Levy, DeRoy, Geffner & Van Bourg were substituted out as attorneys for plaintiff [and appellant] and McCarthy and Perillat were substituted in their place. Plaintiff was represented by McCarthy and Perillat thereafter, until on March 28, 1967, a notice of association of counsel was filed associating Levy, DeRoy, Geffner & Van Bourg as counsel for the purpose of presenting the Motion to Set Aside the Judgment of Dismissal and File Amended Complaint. The notice of said motion was also filed on March 28, 1967.

SPECIFICATION OF ERRORS RELIED UPON

Inadvertently, the specification of errors relied upon was omitted from appellant's opening brief filed in No. 21296. The following is a specification of errors relied upon in both of the consolidated matters.

- (1) The District Court erred in granting respondents' original motion to dismiss the complaint;
 - (2) The District Court erred in failing to grant appellant's motion to set aside the judgment of dismissal;
 - (3) The District Court erred in failing to permit the filing of the amended complaint.
-

SUMMARY OF ARGUMENT

A. The motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure was timely filed and was procedurally correct;

B. The motion for relief should have been granted; it was an abuse of discretion to fail to allow the filing of an amended complaint;

C. The proposed amended complaint states a cause of action, not barred by the statute of limitations;

D. Even on the basis of the original pleading, assuming the amended pleading is not allowed, laches should be applied in this case rather than the State statute of limitations.

ARGUMENT

The argument presented in appellant's opening brief, already on file herein, is adopted and incorporated by reference. The following additional argument relates only to the question of whether the

motion for relief under Rule 60(b) should have been granted.

In *Berry v. Pacific Sportfishing, Inc.*, CA 9, 372 Fed. 2d 213 (1967), this honorable Court considered a case which is apparently decisive of the merits of this appeal. Concededly, the procedural problems in the instant case are not covered by the *Berry* decision, but the substantive question appears to be.

In *Berry*, a wrongful death claim was filed in California Superior Court, arising out of a death on the high seas. The complaint in that case did not indicate that death occurred on the high seas. The answer did not raise the exclusive jurisdiction of the Federal Court under 46 U.S.C. 761.

Neither the answer nor the pre-trial statement of the defendants in that case raised the issue of jurisdiction. After the two year statute of limitations, under 46 U.S.C. 763, had run, proceedings were filed in the Federal District Court and an injunction was obtained against the prosecution in the State Court action. After the limitations period, the plaintiffs commenced proceedings in the District Court. The District Court entered a judgment dismissing the claim on the ground that it was barred by the two year limitations period, which ran out three days before the present action was commenced.

The similarity to our case is striking. The Court of Appeals, in a well reasoned decision, reversed and remanded the case, holding that the statute of limitations was tolled.

The Court said :

“Here, then, we have a case in which the California Court did have power to act in the sense, first, that appellant could file her complaint in that Court, second that the Court could bring the parties before it, and third, it could continue to act, as a Court of general jurisdiction, until it was asserted that it lacked jurisdiction and it determined the assertion was correct. The burden of asserting lack of jurisdiction was on appellees. Yet they never made the assertion. Meanwhile, the claim certainly had not been allowed to slumber until evidence had been lost, memories had faded and witnesses had disappeared. On the contrary, appellant had been pressing her suit, discovery had been had, pre-trial had been completed, and the case had been set for trial. We think that the California action accomplished the purpose as referred to in the Burnett case, and that the Statute of Limitations was tolled . . .”

372 Fed. 2d 213, 215.

It is respectfully submitted that no clearer assertion of appellant's position in the instant case could be made.

The final question is why leave to amend was not asked at the time of the dismissal, in July, 1966. The writer of this brief cannot answer. All he can say is that his firm was not in the case at that time, and therein lies the source of his problem [though not necessarily appellant's problem].

SUMMARY

For the reason set forth in both of appellant's opening briefs, it is respectfully submitted that if her action is allowed to die, on the basis of failing to overcome the bar of the statute of limitations, a manifest injustice will occur. Defendant had ample notice of the claim and took active part in the defense thereof before the statute of limitations had run. No damage is suffered by anyone, and a *just* result will be obtained, if the amended complaint is ordered filed, and plaintiff is allowed to go to trial on the merits of her case against the responsible tort-feasor. Otherwise her claim against him will be forever lost.

Dated, San Francisco, California,
November 27, 1967.

LEVY, DERoy, GEFFNER & VAN BOURG,
By VICTOR J. VAN BOURG,
GEORGE DERoy,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 in the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG.

NOS. 21,300 and 21,448

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

0

BERT KENNETH KANEWSKE,

Appellant,

v.

PAUL H. NITZE, Secretary of the
United States Navy; CAPTAIN
DOUGLAS H. PUGH, Commanding
Officer, United States Naval
Station, etc., et al.,

Appellees.

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AUTHORITIES CITED

CASES

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NOS. 21,300 and 21,448
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

¶

BERT KENNETH KANEWSKE,

Appellant,

v.

PAUL H. NITZE, Secretary of the
United States Navy; CAPTAIN
DOUGLAS H. PUGH, Commanding
Officer, United States Naval
Station, etc., et al.,

Appellees.

APPELLEES' BRIEF

JURISDICTION

Appellees do not question the jurisdiction
of this Court.

STATEMENT OF THE CASE

Appellant Bert Kenneth Kanewske was born
on August 27, 1946. He is a male citizen of the
United States, subject to the Universal Military
Training and Selective Service Act. On June 18, 1965

he voluntarily enlisted in the United States Navy for a period of four years, and pursuant to said voluntary enlistment contract duly swore that he would support and defend the Constitution of the United States against all enemies foreign and domestic:

" * * * I will obey the orders of the President of the United States and the orders of the officers appointed over me * * * So help me God * * *."

On July 12, 1965, in order to receive training in the Nuclear Field Program, he voluntarily agreed to extend the period of his enlistment for two years from the date of its expiration.

On December 2, 1965, pursuant to Bupers Inst. 1616.6 (21300 Resp. Exh. C, superseded by C.5210 Bupers Manual (21300 Resp. Exh. D), a copy of C-5210 attached hereto as Appendix I, he requested to be discharged from naval service by reason of conscientious objection.

On December 30, 1965, pursuant to 5210 (2)(4)(d) of Bupers Manual (Resp. Exh. D 21300), and Department of Defense Directive 1300.6, (Resp. Exh. F. 21300), a copy of which is attached hereto as Appendix II, appellant's request was referred to the Director of Selective Service. By letter dated January 3, 1966 the Director of Selective Service informed the Chief of Naval Personnel to the effect that petitioner's request for discharge and supporting documents did not meet requirements under Selective Service regulations to warrant classification as a conscientious objector. On January 28 his request was disapproved, and he was so notified. (Resp. Exh. B. 21300 is the certified administrative record containing the pertinent documents.)

At no time prior to his enlistment did petitioner claim to be a conscientious objector to participation in war (Appellant's brief, p. 2.) After appellant was denied a discharge, he refused to obey orders. This began when he failed to report on board the USS America, pursuant to orders on March 13, 1966, and remained absent without proper authority until March 28, 1966. The charges and

specifications are set forth in the Amendment to Answer to Petition for Writ of Habeas Corpus in Case No. 21,300 (R., p. 13).

No. 21,300 involves the petition filed prior to the court-martial. No. 21,448 involves the petition filed after the court-martial. In the meantime, appellant has completed his prison sentence, and an appeal is pending before the Armed Services Court of Military Appeals (ASCMA).

QUESTION PRESENTED

Did the District Court have jurisdiction by habeas corpus to discharge an enlisted man from the Service on his claim to conscientious objection to military service?

ARGUMENT

There is no question that appellant is an enlisted man in the Navy. His original contract, June 18, 1965, was for four years, which he extended for an additional two years on July 12, 1965, to gain the advantage of the special school.

His request for discharge having been denied, he then resorted to his own devised course of action and refused to obey lawful orders, beginning with a failure to report on board ship as ordered, and remaining on unauthorized absence for a period of 15 days. A General Court-Martial was ordered on this charge and several other charges.

His first petition in effect says, "the Navy can't court-martial me for refusing to obey orders, because I am conscientiously opposed to military service and therefore the Court must discharge me from the Service."

The Supreme Court of the United States in 1890 in In Re Grimley, 137 US 147, very clearly identified the status of an enlisted man. Petitioner Grimley was found guilty by a court-martial of the crime of desertion. While serving his sentence, he sued out a writ of habeas corpus. The District Court discharged him from custody and the Circuit Court affirmed. The Circuit Court affirmed on the finding that petitioner was 48 years of age at the time of enlistment, although he had represented himself to be 28, and that the enlistment was void.

At page 150 the Supreme Court said,

"it cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction."

Smith v. Whitney,
116 US 167, 177

Burns v. Wilson,
346 US 137

Hiatt v. Brown,
339 US 103

Gusik v. Schilder,
340 US 128

In Grimley, the Supreme Court at pages 151-152, went on to consider the enlistment contract as follows:

"Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes.

* * * *

"By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations. But where a party is sui juris, without any disability to enter into the new relations, the rule generally applies as stated. A naturalized citizen would not be permitted, as a defence to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are

"matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. And in the case of a soldier, these considerations become of vast public importance. While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed."

In re Morrissey
137 US 157

Bell v. U. S.
366 US 393, 402

An enlisted man in the service is under no restraint other than the normal restraint of movement incident to his status as a member of the armed forces.

Wales v. Whitney
114 US 564

U. S. ex rel. McKiever v. Jack, 2 Cir.
351 F.2d 672

McCord v. Page, 5 Cir.
124 F.2d 68

Petition of Green, (DC SD Cal.)
156 F. Supp. 174;
app. dismissed 264 F.2d 63, 9 Cir.;
cert. den. 359 US 917

Brown v. McNamara (DC NJ)
263 F. Supp. 686

Noyd v. McNamara, (DC Colorado)
#67 C-143, April 25, 1967;
aff., No. 9440, 10 Cir., May 16, 1967;
copy attached as Appendix III.

The petitions for habeas corpus herein, insofar as they are directed to securing appellant's discharge from the service, are within the proposition that an enlisted man in the service is under no restraint other than the normal restraint incident to his status. If directed to the court-martial proceedings, there is no question that he was restrained beyond the normal restraint incident to his status.

If the jurisdiction of the court-martial is not subject to challenge, or is sustained, then appellant is under no restraint because of the continued performance of his enlistment contract.

Appellees' position has been well stated by Judge Lane in Brown v. McNamara, supra, beginning on page 691:

"In the instant case the prescribed procedures were followed and it was determined that petitioner was not entitled to either I-0 or I-A-0 classification. We are now asked to review this determination, it being alleged that it was arbitrary and without basis in fact.

"We are dealing here with matters within the control of the Secretary of the Army. Article I, § 8, cl. 14 of our Constitution provides that the President shall be the Commander in Chief of the Army and Navy of the United States and that Congress shall have power to make rules for the government and regulations of the land and naval forces. To a large extent this power has been delegated to the executive branch. Section 3012 of 10 U.S.C. gives the Secretary of the Army broad authority and responsibility with respect to the conduct of the affairs of the Army and in particular his power to discharge enlisted members of the Army before their term of services expires is expressly granted in section 3811(b) of 10 U.S.C.

"The administrative scheme with which we are dealing is designed to create a minimum of disruption of the internal affairs of the Army,--the decision of the departmental headquarters is final. The matter is thus expeditiously handled and during the pendency of the proceedings the applicant is reassigned to duties providing a minimum of conflict with his

"professed beliefs. If discharge or assignment to non-combatant service is denied, he is then returned to normal service and treated like other members of the military.

"[10] It is our belief that this is where the matter should end. It should not be prolonged by bringing the controversy into the courts of law. Cf. Switchmen's Union of North America v. National Mediation Board, 320 US 297, 305, 64 S.Ct. 95, 88 L.Ed. 61 (1943). In arriving at the decision of whetherto accept jurisdiction, we feel that the effect on the military of judicial involvement in the administrative scheme is a very relevant consideration. Acceptance by us of jurisdiction to review the factual basis of the administrative determination could seriously disrupt the internal operations of the military. By the time the matter was reviewed by us and disposed of on appeal an additional year would ensue before 'final' determination. However, without review by the judiciary the military can render a 'final' decision within a relatively short period of time.

"Under the present scheme during the pendency of the administrative determination the military tries to assign the applicant to a non-combatant job. If we were to accept jurisdiction, would the military be expected to set this man aside for the additional time which it takes for his case to move through the courts? 3 The question causes us

"3. Admittedly, they are able to absorb those who have been classified I-A-O and assigned to non-combatant service, but in those cases the man has already proved that he is entitled to the classification.

"great concern. The reason that we are so concerned with the status of the applicant while his case is pending relates to the very nature of the claim of conscientious objection. It appears to us that it will be very difficult for the military to effectively integrate these applicants into any form of combatant training or service while their cases are still being acted upon. It is likely that these applicants will face court martials rather than comply with orders, so they will be able to reinforce the evidence as to the sincerity of their beliefs and their entitlement to discharge or reassignment. ⁴

"We do not wish to foster a situation which results in having part of what is supposed to be our active force immobile and entangled in litigation. How can the military efficiently devote its facilities and personnel to training a military unit if it cannot rely on those who have been properly inducted and are subject to its control? It is one thing for the courts to be in the middle of the thicket on the issue of pre-induction classification and on the issue of whether the proper form of discharge has been granted. Such litigation at the beginning and end of the military term of service is not nearly as disruptive to the function of the armed services as that which threatens the very utilization of the manpower which has been assembled for active service.

"4. While they may continue even after their cases are final, we do not feel that it will occur with as much frequency.

"In those cases in which the courts have accepted jurisdiction to review matters relating to persons already in the military the question involved something more than whether the factual determination was valid. In *Orloff v. Willoughby*, 73 S.Ct. 433, 2 L.Ed.2d 503 (1958), the question was whether the military was acting within its statutory authority. In our case the petitioner has been properly inducted and it is not alleged that the procedure used was in excess of statutory power. We are asked here merely to determine if there is any basis in fact for the determination which was made by the adjutant general. Even this narrow scope of review could result in the disruption of military operations discussed above. It is our feeling that the benefits to be derived from the added safeguard of having us review the administrative determination are outweighed by the burdens on the military which would result. Consequently, we refuse to accept jurisdiction to pass on the factual adequacy of administrative decision."

Appellant argues:

That there is a constitutional right to exemption from military duty for those whose religious beliefs would be violated by participation in war in any form. The argument involves the assumption that appellant's beliefs are such that he would be entitled to exemption from combatant service or training under the Constitution.

The argument here is specious. Reliance is placed upon Girouard v. U. S., 328 US 61, as having expressly overruled U. S. v. Schwimmer, 279 US 644, and U. S. v. Macintosh, 283 US 605. That is so, but only on the issue that an applicant for citizenship by way of naturalization is not disqualified because of refusal to make an absolute promise to bear arms.

On page 16 of his brief, appellant has stated the court's reply in U. S. v. Macintosh to the argument that it is a "fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious principles against doing so."

The Court's reply (p. 623):

"This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, expressed or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."

This is the law, and *Girouard v. U. S.*
affected it not at all.

Wood v. U. S., 5 Cir.
373 F.2d 894

George v. U. S., 9 Cir.
196 F.2d 445

Storey v. U. S., 9 Cir.
370 F.2d 255

Richter v. U. S., 9 Cir.
181 F.2d 591,
cert. den. 341 US 892

Korte v. U.S., 9 Cir.
260 F.2d 633,
cert. den. 358 US 928

Petition of Green (supra)

If there were such a constitutional right,
50 USC APP. Sec. 456(j) would be superfluous.

Appellant argues that he is entitled to
discharge under terms of DOD 1300.6.

Congress has provided for exemption from
military service only in the case of inductees. 50
USC APP. 456(j). When a man enlists he changes his
status. In Re Grimley, supra. Any claim he may
have had was waived once he voluntarily enlisted.
Petition of Green, supra.

50 USC APP Sec. 456(j) and the regulation thereunder do not apply to persons who enlist or who voluntarily enter upon active duty in the armed forces. Brown v. McNamara, supra.

The Department of Defense by Directive 1300.6 (Appendix II), I. Purpose, established "uniform procedures for the utilization of conscientious objectors in the Armed Forces, and consideration of requests for discharge on the grounds of conscientious objection. II: to apply "to all personnel, Army, Navy, Air Force and Marine Corps, and all Reserve Components thereof."

The Navy implemented this Directive by Section C-5210, Chapter 5, Bureau of Personnel Manual. The Army by AR 635-20 and AR 135-20. The Air Force by AFR 35-24. They all expressly state:

"Policy. A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service whether he is serving voluntarily or involuntarily. Administrative discharge prior to completion of his term of service is discretionary with the Service concerned based on a judgment of the facts and circumstances of the case."

"Policy. B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and has accordingly recognized bona fide religious objection to participation in war in any form * * * consistent with this national policy bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable."
[emphasis supplied.]

The key to the action of Congress is the word force. The military service effected by Selective Service induction is imposed on a man by law. The DOD Directive is concerned with men in the Service, voluntarily or involuntarily. Kanewske is serving voluntarily by enlistment. He seeks to terminate his contract prior to the completion of his term.

There is no question of the validity of petitioner's enlistment contract. The contract may be terminated only in accordance with the authority of Congress. 10 USC 3811, 10 USC 6291, 10 USC 8811. There is no statutory authority for the Court to terminate a valid enlistment contract.

Appellant was afford full opportunity to present his application, and appellees, pursuant to the applicable regulations, have denied the application. As was held in Brown v. McNamara, supra, the Federal Courts do not have jurisdiction to review this administrative determination. The Court in so holding quoted from Orloff v. Willoughby, 345 US 93-94:

"We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Judge Prettyman, in Harmon v. Brucker, 243 F.2d 613, rev. on other grounds 355 US 579, chose to express the idea in terms of separation of powers (p. 619):

"Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts."

Noyd v. McNamara, *supra*

Chavez v. Fergusson,
Civil No. 46229, DC ND Calif.,
March 30, 1967.

Appellant asserts denial of due process.

The possible relief that may be accorded a claimant to conscientious objection is a matter of grace. The regulations provide the means for making application. There is no showing that the Navy did not follow its regulations. Procedural requirements of 50 USC APP 456(j) are not applicable. Brown v. McNamara, *supra*. Authorities citing reversing action of draft board because of procedural defects are not relevant. Appellant was given the opportunity to submit any and all evidence he desired. His application was reviewed and denied in accordance with the administrative regulations governing the Navy.

The court-martial that tried appellant clearly had jurisdiction. The Navy Department has not conceded appellant's claim. It has denied it. Appellant voluntarily swore in his enlistment contract to

"obey the orders of the President
of the United States and orders
of officers appointed over me
* * * So help me God."

He did not do so, and was court-martialed and convicted for not doing so.

Appellant's authorities involve draft inductees convicted of failing to report for military service. No court has ever reversed a court-martial conviction on the grounds that since the individual believed he is no longer subject to military law, he no longer has to obey orders of any kind. Appellant was subject to his military contract at the time of his offenses, and as such failed to obey orders at his peril.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

DATED: May 23, 1967.

CECIL F. POOLE
United States Attorney

By: 

CHARLES ELMER COLLETT
Chief Assistant United States Attorney
Attorneys for Appellees.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


CHARLES ELMER COLLETT
Chief Assistant United States Attorney

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing APPELLEES' BRIEF was served upon appellant by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Appellant:

LLOYD E. McMURRAY, Esq.
McMURRAY & TEPPER
228 McAllister Street
San Francisco, California 94102

A handwritten signature in dark ink, appearing to read "Charles Elmer Collett", is written over a horizontal line.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED: May 24, 1967

designators, an entry shall be made on page 13 of the service record indicating such assignment and the authority therefor. This designator will also be entered in parenthesis as a standard part of each enlisted individual's identification on all pages 13 of the service record in the following manner:

RM2 (RM 0105/0000) (L-6)
 PNI(PN-242)

(3) This designator shall be included as part of each enlisted and inducted person's identification when transfer orders and correspondence regarding him by name are prepared.

(4) These designators shall not be changed or removed unless so authorized by the Chief of Naval Personnel.

(5) Unless assigned to one of the above categories an individual shall be considered potentially qualified for all types of duty.

(6) Personnel assigned to one of the above categories shall not be permitted to extend their enlistments, reenlist, or to further obligate themselves for additional active duty, unless so authorized by the Chief of Naval Personnel. Requests for extension, reenlistment, or additional active duty shall be forwarded sufficiently in advance to permit determination prior to expiration of service and should be accompanied by current report of physical condition, if appropriate.

C-5209. EMPLOYMENT OF STEWARD GROUP RATES

(1) As provided by Title 10, U.S. Code, Section 7579(a) - (b), "(a) Under such regulations as the Secretary of the Navy prescribes, enlisted members of the naval service and enlisted members of the Coast Guard when it is operating as a service in the Navy may be assigned to duty in a service capacity in officers' messes and public quarters where the Secretary finds that this use of the members is desirable for military reasons. (b) Notwithstanding any other provision of law, retired enlisted members of the naval service and members of the Fleet Reserve and the Fleet Marine Corps Reserve may, when not on active duty, be voluntarily employed in any service capacity in officers' messes and public quarters without additional expense to the United States."

(2) Steward group rates may be assigned to duty only in:

(a) Officers' messes afloat, including flag messes, cabin messes, wardroom messes, and warrant officers' messes.

(b) Officers' messes temporarily set up on shore by order of competent authority, for a period of less than 6 months, for officers attached to:

1. Seagoing vessels.
2. Landing forces and expeditions.

(c) Commissioned officers' messes (closed), authorized by the Chief of Naval Personnel to provide either essential lodging or food service or both.

(d) Messes in which midshipmen or aviation cadets are subsisted.

(e) Individual public quarters of an officer on shore only when specifically authorized by the Secretary of the Navy. This authorization is indicated by a notation on the enlisted allowance of the appropriate activity issued by the Chief of Naval Personnel.

(f) Activities where officers (or other qualified patrons) are authorized to subsist in the General Mess in accordance with the provisions of paragraph 41065, BuSandA Manual.

(g) Officer and/or enlisted OPEN Messes in positions of Treasurer or Assistant Treasurer in accordance with Articles 303 and 304 of the Manual for Messes Ashore, NAVPERS 15951 (series).

(3) All steward group rates assigned to aircraft squadrons or detachments and aviation staff shall, when based ashore, be detailed to the support activity. All steward group rates assigned to staffs and units of the forces afloat and temporarily or permanently based ashore will similarly be assigned to the supporting shore activity, unless the commander has been specifically authorized by the Chief of Naval Personnel to operate a commissioned officers' mess (closed) ashore or unless excepted under subparagraph (2)(b) above.

(4) See article C-11101 for policy pertaining to employment in civil pursuits or outside regular working hours.

*C-5210. CONSCIENTIOUS OBJECTION TO NAVAL SERVICE

(1) The Secretary of Defense has established guidelines set forth herein for the utilization of personnel classed as conscientious objectors and for processing requests for non-combatant duty assignments or discharge from enlisted or inducted personnel based on conscientious objection. The following background information and criteria established by the Secretary of Defense for determining conscientious objection are furnished:

No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the Secretary of the Navy, based on judgment of the facts and circumstances in the case. Federal courts have held that a claim to exemption from military service under the UMT&S Act must

proposed prior to notice of induction and to make timely claim for exemption states waiver of the right to claim. Therefore, requests for discharge after military service, based solely on conscientious objection which existed but was claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for noncombatant duty assignment or a discharge based solely on conscientious objection cannot be entertained by Selective Service prior to assignment to noncombatant duties or discharge from the naval service on the basis of conscientious objection will be made on an individual basis, with final determination made by the Chief of Naval Personnel in accordance with the facts and circumstances in the particular case and the policy set forth herein. In considering requests for noncombatant duty assignment or discharge based on conscientious objection after entering military service, standards used by the Selective Service are in determining 1-0 or 1-A-0 classification of draft registrants prior to induction are applied. 1-A-0 classification permits entry into the military service and the registrant is required to perform duties as outlined in paragraph (3) of this Article. 1-0 classification does not permit induction into military service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program). In either of the classifications, the registrant is required to fulfill his obligations under the UMT&S Act. In advisory opinion by the Selective Service, classification of 1-0 is appropriate only if the registrant will be a requisite for discharge from conscientious objection for members of the Selective Service for more than two years active service. The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not quantitative objective measurements which can be applied across the board, but are the result of extensive experience and practices which have been upheld in the Courts in connection with legal obligations for service. Among the factors considered are such items as membership in a peace church, training in the home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities, participation in religious activities, and the credibility and the credibility of persons supporting his claim. In the case of personnel not eligible for induction after discharge because of having served 180 days or more on active duty, the individual's willingness to perform voluntarily in post-military work of the nature encompassed by the Alternate Service Plan of Selective Service may also

be pertinent. While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.

(2) Requests for discharge or assignment to noncombatant duties based on conscientious objection to naval service will be processed as follows:

(a) Individual requests will be submitted to the Chief of Naval Personnel via the commanding officer. Each request will be accompanied by a statement from the member containing the following information:

1. General Information:

- a. Full Name
- b. Service Number
- c. Selective Service Number
- d. Duty Station
- e. Permanent Home Address
- f. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

g. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.

h. Give all addresses and dates of residence where you have formerly lived.

i. Give the name and address of your parents and indicate whether they are living or deceased.

j. State the religious denomination or sect of your father and mother.

k. Did you apply to the Selective Service System (local board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the board, if known?

1. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes ☐ No ☐.

Will you consent to the issuance of an order for such work by your local Selective Service Board? Yes ☐ No ☐.

2. Religious Training and Belief:

a. Do you believe in a Supreme Being?

b. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

c. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.

d. Give the name and present address of the individual upon whom you rely most for religious guidance.

e. Under what circumstances, if any, do you believe in the use of force?

f. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

g. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

3. Participation in Organizations:

a. Have you ever been a member of any military organization or establishment before entering the naval service for this tour? If so, state the name and address of same and give reasons why you became a member.

b. Are you a member of a religious sect or organization? If your reply is "yes" -

1. State the name of the sect, and the name and location of its governing body or head, if known to you.

2. When, where, and how did you become a member of said sect or organization?

3. State the name and location of the church, congregation, or meeting where you customarily attend.

4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

(c) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

4. References: Give the name, full address, occupation or position, and relationship to you, of persons who could supply information as to the sincerity of your professed convictions against participation in war.

(b) The commanding officer and a chaplain, if available, shall interview the member and review the information contained in his request. The commanding officer's endorsement shall in all cases express his opinion as to the sincerity of the man and if request or recommendation is for assignment to non-combatant duties, make a recommendation as to whether or not the member concerned should be assigned to noncombatant duties or

training and, if so, whether or not he is qualified and desires assignment to Hospital or Dental Corps School. If he does not desire such duties or training or is not qualified, the Commanding Officer shall state whether or not his services can be utilized on board his present duty station, if assigned a limited duty designator L-8. The chaplain's comments and opinion should be enclosed therewith. Pending action on his request, the individual will be assigned duties or training which provide the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.

(c) Immediately upon receiving a request for discharge on the grounds of conscientious objection, the commanding officer will advise and counsel the member concerning the provisions of Section 3103, Title 38, United States Code, which provides that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authority, shall bar all rights (except Government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, Veterans Administration, that the member was insane. After counseling, the member will be required to sign, date, and submit as an enclosure to his request, the following statement: "I have been counseled concerning possible nonentitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector, who refused to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance."

(d) The Chief of Naval Personnel will refer the cases of all members who have completed less than 2 years of active duty to Selective Service for an advisory opinion. Discharge of members based solely on conscientious objection normally will not be made unless the member is classed as 1-0 by Selective Service. The Chief of Naval Personnel may refer the cases of personnel who have completed more than 2 years active duty to Selective Service for an advisory opinion prior to final action. Discharge, when directed by

head Naval Personnel, will be by reason of the government (Article 30(1)(i) with type warranted by the individual's military record.

Those members who request discharge from 1-A-0 vice 1-0 classification is recommended by Selective Service normally will be discharged for conscientious objections. Such personnel, as well as those initially requested noncombatant status, will, if assigned limited duty designator (L-8) by the Chief of Naval Personnel, as outlined in paragraph (3)(b), individuals for whom neither 1-0 nor 1-A-0 classification is recommended by Selective Service normally will be retained in naval service, subject to normal duty assignments.

Personnel who are assigned a 1-0 classification by Selective Service and whose discharges are directed early enough so that discharge occurs prior to completion of 180 days of duty will be discharged for the convenience of the government by reason of conscientious objection to permit service in the Conscientious Objector's Work Program. In such cases, the commanding officer will notify the Director of Selective Service, Washington, D.C., by letter of the date of discharge from naval service, the fact that the individual has not completed 180 days of active duty and will request Selective Service to release the individual for the alternate service authorized by the UMT&S Act.

Accrual of reenlistment bonus, if any, will be required in those cases in which discharge is directed by the Chief of Naval Personnel.

Assignment to Noncombatant Duties Training.

Definitions:

Noncombatant duties are defined as service in any unit of the armed forces which is unarmed at all times; or service in the medical/dental department of any unit of the armed forces, where performed; or

any other assignment the primary function of which does not require the use of arms or that; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms in order to be trained in their use.

Noncombatant training is defined as training which is not concerned with the use, care, or handling of arms or weapons. Assignments. Personnel assigned a limited duty designator (L-8) by the Chief of Naval Personnel or who have been classified by their local induction board prior to induction will be assigned as follows:

Personnel who have not completed recruit training will be transferred to a Naval Training Center for recruit training and will be subject to all regular noncombatant duties as defined in subparagraph (3)(a).

Further assign-

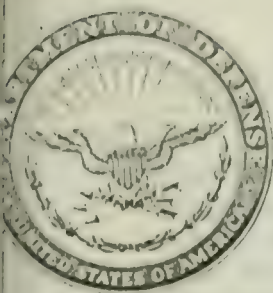
ment will be in accordance with subparagraph (3)(b)2. below.

Personnel who have completed recruit training who desire and are fully qualified in all respects, shall be transferred to the medical/dental corps for further training and assignment. Such personnel, because of assignment to medical/dental units, will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical/dental organization. Any man who does not desire such training or assignment and/or who does not meet the requirements therefor, or, if so assigned, fails to complete the course, will be retained in the service and employed in noncombatant duties. If the commanding officer cannot utilize the member in noncombatant assignment, he should report this fact to the cognizant personnel distributor who will transfer member to noncombatant duty assignment in a unit under his cognizance or effect his transfer to EPDOCONUS who will assign him to noncombatant duties.

(c) Personnel assigned to noncombatant training or duties in accordance with the above will be required to sign and date the following page 13 service record entry: "I have been counseled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or active service in the Armed Forces."

(d) Personnel who are returned to normal duty assignments by reason of failing to qualify for designation as a conscientious objector or personnel who are assigned a limited duty designator (L-8) by reason of conscientious objection, and reassigned to noncombatant duties, who demonstrate inability or unwillingness to cooperate fully in the performance of their assigned duties, will be processed for administrative separation or disciplinary action, as appropriate, in the same manner as any other member of the naval service who demonstrates similar behavior.

(e) Article C-5208 contains instructions for assignment of limited duty designator. Pertinent instructions contained therein relative to service record entries and use of designator shall be followed. In addition, the following page 13 service record entry will be made upon an individual's assignment as L-8: "NOT TO BE REENLISTED, EXTENDED OR PERMITTED TO FURTHER OBLIGATE WITHOUT PRIOR APPROVAL OF THE CHIEF OF NAVAL PERSONNEL. Appropriate diary entry will be made in accordance with the instructions contained in NAVPERS 15,642, Part I."



August 21, 1962
NUMBER 1300.6

ASD(M)

Department of Defense Directive

SUBJECT Utilization of Conscientious Objectors and Procedures
for Processing Requests for Discharge Based on
Conscientious Objection

References: (a) DoD Directive 1332.14, "Administrative Discharge"
(b) DoD Directive 1315.1, "Disposition of Conscientious
Objectors," June 18, 1951 (cancelled herein)

I. PURPOSE

This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

II. APPLICABILITY

The policies and procedures set forth herein apply to all personnel of the Army, Navy, Air Force and Marine Corps and to all Reserve components thereof.

III. POLICY

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.
- B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection.

to participation in war, in any form, to the extent that an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable.

- C. Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.
- D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. The type of discharge, if separation is deemed warranted, will be determined by the individual's military record, the standards set forth in reference (a), and the procedural guidelines herein.
- E. In evaluating requests for discharge based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that discharge procedures of the services not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards.
- F. The standards used by the Selective Service System in determining 1-O or 1-A-O classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. 1-A-O classification permits induction into the military service and the inductee is required to perform duties as outlined in Section V.A. of this Directive. 1-O classification does not permit induction into military

service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program). In either of the classifications the registrant is required to fulfill his obligations under the UMT&S Act.

- G. In order to insure the maximum practicable uniformity among the services and between members of the same service, advisory opinion by the Selective Service that a classification of 1-O is appropriate will normally be a requisite for discharge or release of members with less than two years active service based on conscientious objection.

IV. CRITERIA

- A. The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board, but are the result of extensive experience and practices which have been upheld in the Courts in connection with legal obligations for service. Among the factors considered are such items as membership in a peace church, training in home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities, his participation in religious activities, and his credibility and the credibility of persons supporting his claim. In the case of servicemen not liable for induction after discharge because of having served 180 days or more, the individual's willingness to engage voluntarily in post-military work of the nature encompassed by the Alternate Service Plan of Selective Service may also be pertinent.
- B. While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.
- C. Evaluation of the sincerity of a claim of conscientious objection requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

PROCEDURE

- A. 1. Individuals inducted into the Service who have previously been classified as 1-A-O by local induction boards should be assigned to noncombatant service, which in accordance with the President's Executive Order No. 10028, dated January 13, 1949, is defined as:
- (a) service in any unit of the armed forces which is unarmed at all times;
 - (b) service in the medical department of any of the armed forces, wherever performed; or
 - (c) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

"The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

2. Such persons, upon induction into the Service, shall be transferred to a training center, or station, for recruit training and shall be subject to all regular training, except the portions thereof specifically excepted by Executive Order No. 10028 quoted in A.1, above. Thereafter, upon completion of recruit training, they shall be transferred to Hospital Corps, or Medical Department, for further training, provided they meet the requirements therefor. Such men, because of assignment to medical units will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical organization. Any man who does not meet the requirements for this training, or who fails to complete the course, will be retained in the service and employed in noncombatant duties.

- B. Personnel who claim to be conscientious objectors and state that they were so classified by their local board but their records do not so indicate:

1. The Commanding Officer shall obtain a statement from the individual concerned and refer the case to the departmental headquarters of the individual's service for investigation and decision. The departmental headquarters will investigate the matter through Selective Service.

2. If it is determined that the man should have been classified as 1-A-O, but inadvertently was not so classified, the records will be corrected, and the Commanding Officer will be directed to correct his records accordingly. The man then will be processed as indicated in V.A. above.
 3. If it is determined that no change in classification is warranted, the individual will be notified to this effect.
 4. Upon first referring of the case, pending its decision, the individual should be retained at his command and employed in noncombatant duties.
- C. 1. Individuals requesting discharge for conscientious objection will submit information as required in Inclosure 1 and such other documentation of their cases as is deemed appropriate by the military department concerned. In order to preserve the maximum practicable uniformity of treatment for like cases, requests and supporting papers will be forwarded, together with any other pertinent information known to the immediate command, to departmental headquarters for individual determination of action on the basis of the facts and the special circumstances of each case.
2. Immediately upon receipt of a request for discharge on grounds of conscientious objection, the member will be fully advised and counselled concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counselling, the member will be required to sign and date the statement appended hereto as Inclosure 2.
 3. Before making a determination concerning a possible discharge for conscientious objection in cases falling within the terms of Section III.G., the military department concerned will forward each case to the Director, Selective Service System, Washington 25, D.C., for an advisory opinion as to the individual's proper classification under the UMT&S Act. At the discretion of the military department concerned, advisory opinions may also be sought on members with two or more years service.

- D. 1. Individuals for whom 1-O classification is recommended by Selective Service will be considered for discharge by reason of their conscientious objection to military service.
2. Individuals for whom 1-A-O classification is recommended normally will not be considered for discharge for conscientious objection reasons, but will be reassigned to noncombatant duties as outlined in Section V.A. of this Directive. Individuals so reassigned will be required to sign and date the statement appended hereto as Inclosure 3.
3. Individuals for whom neither 1-O nor 1-A-O classification is recommended by Selective Service will be retained in military service, subject to normal duty assignments.
4. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the military service who demonstrates similar behavior.
- E. 1. Individuals for whom 1-O classification is recommended by Selective Service will normally be discharged "For the Convenience of the Government." Conscientious objection will be cited as the supporting reason in order to avoid possible future confusion. Pending separation, the individual will be assigned duties providing the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.
2. Personnel with less than 180 days service (volunteers or inductees) who are determined to be bona fide conscientious objectors (1-O classification) and whose request for separation is made early enough so that discharge occurs prior to completion of 180 days active duty will be separated for the convenience of the government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the Selective Service System will be promptly notified of the date of discharge from the military service, the fact that the individual has not completed 180 days active duty, and will be requested to "induct" the individuals for the alternate service provided by the UMT&S Act.

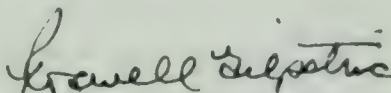
- 1300.6
- F. Determination by the military department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

VI. IMPLEMENTATION AND EFFECTIVE DATE

- A. All service regulations and policies in conflict with this Directive shall be cancelled immediately. Three copies of regulations implementing the policies contained herein will be furnished to the Assistant Secretary of Defense (Manpower) within 90 days from the date of publication of this Directive.
- B. This Directive is effective immediately.

VII. CANCELLATION

Reference (b) is hereby superseded and cancelled.


Deputy Secretary of Defense

Inclosures - 3

1. Required Information
2. Statement (counselling concerning VA benefits)
3. Statement (counselling concerning designation as conscientious objector)



NO. 21301A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. H. WATTENBURG and
WILLIAM P. OWENS,

Appellants

v.

UNITED STATES OF AMERICA

Appellee

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W. H. WATTENBURG and
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v.

UNITED STATES OF AMERICA

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BRIEF OF APPELLANT WATTENBURG
JURISDICTIONAL STATEMENT

This is an appeal (1R. 144)* from a judgment of conviction (1R. 141) entered by the United States District Court for the then Northern District of California, Northern Division, upon a jury verdict (1R. 29) finding appellant W. H. Wattenburg guilty of two counts of felony.

The notation "___ R. ___" refers to the record by volume and page.

All emphasis in quotations is supplied unless otherwise indicated.

Count I of the Indictment rests on the conspiracy statute, 18 USC §371. It charges that in October, 1965, appellant Wattenburg and his co-defendant, appellant Owens, conspired "to defraud the United States" and to violate the larceny statute (18 USC §641) and, specifically, to "steal" and "convert unidentified "timber" of the United States Forest Service of a value in excess of \$100. Count II of the Indictment charges appellant Owens with larceny in that "on or about October 16, 1965," and "in the Plumas National Forest" he did "steal, purloine and knowingly convert", in violation of 18 USC §641, "approximately 1,000 Red Fir (silver tip) trees belonging to the United States, the value of which trees exceeded the sum of \$100". Count II also charges that appellant Wattenburg, in violation 18 USC §2, aided and abetted this alleged conduct.

Appellant Wattenburg moved for a judgment of acquittal at the conclusion of the prosecution's case (3R. 560-561), at the conclusion of all the evidence (5R. 1012), and again after verdict, combining with the latter motion a motion in arrest of judgment and for a new trial. (1R. 41; 145). All these motions were denied. (3R. 582; 5R. 1024; 6R. 1367).

This Court has jurisdiction by virtue of 28 USC §1291.

STATEMENT OF THE CASE

This case has to do with trees of Christmas tree size which were cut down and removed from Sections 21 and 22,

Township 27 North, Range 11 East, 30E 4M. The indictment however, discloses none of this.* There is neither claim nor evidence that appellant Wattenburg cut or removed any tree. No one saw anyone cut or remove anything from these lands. The entire case is circumstantial and, with classic understatement, is conceded by Government counsel to be "close". (6R. 1350).

These Sections 21 and 22 are 1280 of the over 1,000,000 acres making up Plumas National Forest. They are owned by the United States, except for nine unpatented mining claims located in the approximate center of Section 22 near Palmer's Cabin. (4R. 760, 823). These claims were located by Frank Palmer in 1932 (3R. 596) and subsequently quit-claimed by him to Dr. W. H. Wattenburg, son of appellant Wattenburg. (D. Ex. K; 4R. 741).**

* As the trial court put it (2R. 55):... I am concerned ... I do not believe that there is anything in the Indictment or anywhere else that tells we are talking about Township 27 North, Range 11 East ... This could be as far as I know, about the sale of Manhattan Island."

** Dr. Wattenburg is a member of the electrical engineering faculty at Berkeley, and a consultant to various Government space agencies. (4R. 733).

Dr. Wattenburg is also a joint tenant in four forest parcels in Section 23, immediately to the east of Section 22 and also part of the Plumas National Forest. These parcels, all in the Wilcox Valley area, were conveyed by the former owners by three separate deeds. (D. Exs. G - 1, G - 2, and G - 4).** Defendant's exhibit J, a surveyor's map of the area, depicts the properties. They consist of a 20-acre strip divided by a meadow along the northern boundary of Section 23; two 20-acre pieces along the northwest side of Section 23, the westerly boundary of each of which is the line dividing Sections 22 and 23, and another contiguous 5 acres - 65 acres in all.

In Greenville, some 30 miles by road from these forest properties, is the Hideaway Lodge (4R. 756), a motel owned by Dr. Wattenburg and his wife. (D. Ex. G-6,7; 4R. 741). Appellant Wattenburg resides at and operates the Hideaway. (3R. 595).

During the summer of 1965, Dr. Wattenburg, who has had extensive experience in the woods and with Christmas trees (4R. 736), examined his lands in Section 23 with an eye to harvesting Christmas trees. (4R. 770). He is a man trained

**

By a fourth deed (D. Ex. G-3), half of one of the parcels conveyed by D. Ex. G - 4 to four joint tenants, including Dr. Wattenburg, was conveyed by them to Dr. Wattenburg and his sister.

to think in precise terms, and had bought these parcels the year before, after careful examination, for the express purpose of cutting Christmas trees. (4R. 783). Both in 1964 and 1965 he found these parcels teeming with thousands of red fir Christmas trees. (4R. 742-744; 796-799). The density of the trees in this area is vividly illustrated by an aerial photograph (P. Ex.16) and by the fact that the surveyors, instead of simply proceeding directly down the boundaries, were required to lay traverses out into adjoining sections to establish these lines. (D. Ex. J; 4R. 827).

Satisfied that there was an abundance of merchantable Christmas trees on these Wilcox Valley properties, Dr. Wattenburg, in the summer of 1965, showed his father the areas he wished cut there if trees were to be cut that season (4R. 770, 771) and in August, 1965 gave him a power of attorney for the purpose. (D. Ex. K). This operation was conducted on behalf of Wattenburg Lumber Company, a sole proprietorship owned by Dr. Wattenburg (4R. 762, 819) from which appellant Wattenburg received a flat salary of \$3,500 per year. (4R. 673, 763). His compensation depended in no way on the number or value of the trees cut, and all profits of the venture were deposited in the Logging Company bank account. (4R. 762).

On October 4, 1965, appellant Wattenburg presented himself at the office of the Sheriff of Plumas County to

obtain the transportation tags required by Cal. Penal Code §384c before one may lawfully transport Christmas trees on a public road. (2R 240). These tags are filled in by the person who loads the trees on a vehicle. (2R. 198). Prerequisite to the issuance of these tags is an application filed with the Sheriff stating, among other things, the amount and species of the trees to be transported, and the legal description of the land from which they are to be removed. Cal. Penal Code §384c.

Appellant Wattenburg wished to obtain tags for properties located in three different areas, i.e., The Hideaway,* "Round Valley" and "Wilcox Valley". (4R. 693). Each was the subject of a separate application (P. Ex. 4 A-C; 7 A-C), but all were discussed at the Sheriff's office at the same time. (5R. 871). At the property near the Hideaway and at Round Valley there were no red fir trees (4R. 632-633). As just seen, however, there were many red fir at "Wilcox Valley". The applications were written by Miss Forbes, a stenographer-matron in the Sheriff's office, based on this composite conversation. (5R.872 Appellant Wattenburg described to Miss Forbes the Section 23 properties simply by Township, Range, Section and the loose appellation "Wilcox Valley" (4R. 633), intending to refer to his son's parcels there situate. (4R. 712, 713). The applications

*
Contiguous to the Lodge is a 40-acre wooded parcel. (D. Ex. G-6,7; 4R. 741).

for the Hideaway and Round Valley were accepted, but an argument broke out over the "Wilcox Valley" application, the gist of which was that appellant Wattenburg had no right to cut there and a demand for proof of ownership. (4R. 623). At this juncture, appellant Wattenburg contracted his attorney, Stanley Young, Jr., to straighten matters out. (4R. 613,659). The following morning there arrived in the Sheriff's office a letter from the title company (P. Ex. 15, 4R. 660) which, even up to the time of trial, appellant Wattenburg had never seen. (4R. 659). This letter contained only the description of 20-acre meadow parcel, i.e., the title searcher had found the deed which is D. Ex. G-1, and then had stopped the search, thereby overlooking the other deeds to "Wilcox Valley" properties. With this letter before her (5R. 876), Miss Forbes wrote up the "Wilcox Valley" application and appellant Wattenburg signed it without paying attention. (4R. 615). As thus prepared, the application covered only the 20-acre meadow parcel and provided for the transportation of 2,000 "W.F.", i.e. white fir. It is in this total confusion, arising out of argumentative conversations with a man who is hard of hearing (3R. 595),* that this case begins.

* And see, e.g., 4R. 604, 606.

Appellant Wattenburg then entered into a written contract with Owens* under which Owens was to cut trees. (D. Ex. E; 4R. 604). He then took Owens to the Wilcox Valley area, showed him the lines not only of the 20-acre meadow parcel described in the "Wilcox Valley" application but of the other Wilcox parcels as well, a total of 65 acres. (4R. 706-707). He did not conspire with Owens to steal Government trees or suggest that Owens go get Government trees (4R. 710), and it would have been pointless and absurd for him to do so. Not only were the Wilcox Valley properties teeming with trees,** but to send Owens to cut in Section 22, where the mining claims were located, could readily jeopardize those claims. (4R. 761)***

* Appellant Wattenburg had met Owens for the first time in early October, and had installed Owens and his large family in one of appellant Wattenburg's houses in Greenville. (4R. 708,709). This was nothing unusual; since 1945 appellant Wattenburg had supported or advanced money to 31 individuals or families in Greenville. (4R 770).

** Even after the cutting, Ranger Kennedy observed 500 red fir trees standing on the 20-acre meadow parcel, the least overgrown piece of all. (2R. 202,203).

*** The owner of a mining claim enjoys the exclusive right to possession of the surface, even against the Government, but he has no right to cut trees on the claim except as necessary to work the claim. 30 U.S.C. §26; United States v. Deasy, 24 F. 2d. 108 (D. Idaho); United States v. Etcheverry, 230 F. 2d. 193 (10 Cir.).



The actual cutting of trees was done by Owens and men working under his supervision, including Upton and Kirkpatrick. (3R. 551). Owens declined to testify. Upton and Kirkpatrick were called by the prosecution, and we discuss their testimony at pages 15 and 16-18, infra.

On November 4, 1965, Ranger Seix saw in Section 22, 75-100 "fresh cuttings" (whatever that means) of Christmas tree size trees. (2R. 59). As conceded by Government counsel, "it was never clearly resolved what a freshly cut tree was". (6R. 1342). This was the tail-end of the cutting season because Christmas and the snow were fast approaching. There had been many cutters at work in the County, for the sheriff had on file over 100 applications for transportation tags (5R. 873), and Ranger Kennedy noted such tags filed by others who were cutting "in the immediate area." (2R. 221). Seix, however, also saw appellant Wattenburg in another part of Section 22, near a caterpillar tractor and the "low boy" used to move it. (2R. 61, 63).



This tractor had been taken into the area to do the "assessment work" on the mining claims in Section 22, such work being required annually by federal law,* and appellant Wattenburg was on the property with the "low boy" to bring the tractor out of the forest (4R. 611,612).

Seix immediately reported to his superior, Kennedy (2R. 63), who immediately examined the applications for transportation tags signed by appellant Wattenburg. (2R. 179, 180). None referred to red fir, and the "Wilcox Valley" application listed only the 20-acre meadow parcel. The same day, November 4, Kennedy drove to the Hideaway and there observed a stockpile of Christmas trees containing red fir trees. (2R.185).

The next day, Kennedy dispatched Seix back to the woods with two helpers to find the number of "stumps that were fresh and current". (2R. 190). The same day Seix and his helpers returned to the forest and took 10 "stump cuts",

* 30 U.S.C. §28, Dye v. Duncan, Dieckman & Duncan Mining Co., 164 F. Supp. 747, 756.

i.e., discs from the tops of stumps. (2R. 63,64). They also searched over the one parcel described in the "Wilcox Valley" application signed by appellant Wattenburg, i.e., the 20-acre parcel divided by a meadow, counted 113 Christmas trees cut there (3R.338), and estimated that there were 500 red fir Christmas tree size trees still standing on this single parcel. (3R. 345).

The next day, Seix again returned to the forest with helpers, and they made 28 additional stump cuts. (2R. 64). For all that appears, none of the helpers had ever been in this area before November 4, and none had any basis for determining what period had elapsed since a tree had stood on any stump found, i.e., what was "freshly cut". The activities of this entire group of searchers over this two-day period were presented through the testimony of Seix only, although it is plainly composite hearsay. His testimony was that a total of 1047 trees had been cut in Sections 21 and 22, 1033 being red fir. (2R. 99).

On Monday afternoon, November 8, at 2:35 P.M. (3R. 355), Investigator Adams, a criminal investigator

employed by the U.S. Forest Service (3R. 347), went to the Hideaway Lodge "to conduct a search of the Wattenburg stockpile and to endeavor to make some matches of evidence cuts taken from Section 21 and 22 with trees in that stockpile." (3R. 354-355). He had with him "several" forest officers (3R. 356), a concededly invalid search warrant (3R. 294-295),* and the wafers taken previously by the Forest Service employees. (3R. 356). He had obtained no arrest warrant. (2R. 116). Neither Owens nor appellant Wattenburg was present, Wattenburg not arriving until 5:00 P.M. (3R. 396) and Owens not until about 6:00 P.M. (3R. 403).

The stockpile to be searched was located "immediately behind" (2R. 31) and "immediately adjacent" to the Hideaway, at a distance of 20 feet from the building. (2R. 32). It was but 5 feet from the parking area in the back of the building. (2R.227,228). As the trial court aptly put it,

* F. Rules Crim. Proc. Rule 41 (a) requires that a search warrant issued out of a state court be issued out of a court of record. Adams' search warrant was issued by the judge of a local justice court (2R. 114,117) which is not a court of record. Cal. Const. Art. 6, Sec. I; Witkin California Procedure, Courts, §56.

the pile was in appellant Wattenburg's "backyard" (6R. 1348, 1370). Adams and his team "immediately began to search the piles" (3R. 357) and, by the time appellant Wattenburg arrived, seven matches had been made. (2R. 286). Adams also made "an eyeball survey" from which he "estimated that there was in the neighborhood of between two and three thousand trees in the stockpile" (3R. 387) "nearer 2500" (3R. 387), "the majority" of which were red fir. (3R. 357). Nothing was counted. Adams testified that no more than 10 - 15% were "freshly cut" (3R. 411), i.e., at a maximum, 15% of 3000 or 450 were "freshly cut". (3R. 412). There is no evidence as to how many of these "freshly cut" trees were red fir.

Upon appellant Wattenburg's arrival about 5 P.M. Adams asked him questions, reduced his answers to a written statement and appellant Wattenburg signed it (3R. 396, 398, D Ex. D). The search continued until about 9 P.M. (3R. 359). Ultimately nine of the 38 wafers brought on the premises were matched (3R. 416), and the nine matching trees were seized. (3R. 415). No other trees in the stockpile were taken, and no "hold" of any kind was placed on them.* No attempt was made

*
Indeed, as Adams testified, the records of the Sheriff's office showed 1700 red fir trees "off of Mr. Wattenburg's properties" transported out of the county under transportation tags validated by peace officers. (3R. 380, 381).

to match at any other operator's stockpile any of the 29 wafers which did not match any trees in the Hideaway pile. (3R. 416, 417).

After the taking of appellant Wattenburg's statement had been completed, Adams understood Owens to say: "Merv, you can't possibly make a match because I have second cut every tree in that pile" (2R. 369). To "second cut" a tree means to cut off part of its stem, thereby making it impossible to match the stem with a stump in the forest. (3R. 369). This statement was patently absurd and untrue because (a) it would be pointless to second cut anything but trees from Government land; and as the Government was missing only 1047 trees and there were some 2500 in the pile, there were some 1500 trees at the Hideaway which could not possibly have been Government trees;

(b) nine wafers matched; and (c) the prosecution's witnesses, the cutters Upton and Kirkpatrick, both testified that no trees were "second cut" until the day after Adams' visit, and then for the purpose of preserving evidence to dispute the Government's claim. Thus (3R. 515):

"BY MR. SIMONELLI:

Q. Do you know what a second cut is, Mr. Upton?

A. Yes, sir, I do.

Q. Were any of the trees you cut for Mr. Upton (sic) and Mr. Owens second cut?

A. At the Hideaway Lodge is all.

Q. When was that, sir?

A. I don't know the exact date but it was the day after Mr. Adams came up there and confiscated the pile.

Q. Confiscated the nine trees?

A. Yes.

This was fully confirmed by Kirkpatrick. (3R. 554, 555).

From each of the nine trees taken by the Forest Service from the Hideaway a wafer was cut. (3R. 359). These nine wafers were then matched with nine of the wafers supposedly taken from stumps in Sections 21 and 22 as evidence that these nine trees were Government trees. (3R. 444). In addition, a paint smudge on the stem of one of the nine trees taken from the Hideaway was "similar" to the paint on a vehicle

used by Owens and his helpers in moving trees from the woods to the Hideaway (3R. 445).

These nine Christmas trees, found by unlawful search in a pile of 2500 or more Christmas trees, were the crucial evidence in the case forming the predicate for instructions respecting the inferences to be drawn from possession of stolen property. Appellant Wattenburg moved twice to suppress this evidence. Before trial, the motion was denied without prejudice (2R. 2, 34). Renewed at trial (2R. 115), it was denied with finality. (3R. 334). Appellant Wattenburg, who had cut nothing and did not know what Owens or his helpers had actually done, was called on to explain how these nine trees got into the pile at the Hideaway. The answer to this question, which is tantamount to asking a chicken farmer to explain how a particular hen got into a vast flock, appellant Wattenburg was unable to furnish. Neither was he able to show the wide discrepancies between the prosecution's claims and the physical facts, because very shortly after the nine trees were taken from the Hideaway, it was snowing in Wilcox Valley, and until after the trial was over, the entire area was inaccessible for purposes of inspecting the ground. (3R. 384; 4R 709).

There were two eyewitnesses to the actual cutting of trees. They were Upton and Kirkpatrick, both called by the



prosecution. Upton had been interviewed by investigator Adams and had given him a written statement. (3R. 529, 530). Kirkpatrick had discussed his testimony with Adams and government counsel several times, including the night before and the morning he gave it. (3R. 557). Upton testified that Owens gave him his orders where to cut (3R. 515), but the prosecution scrupulously avoided asking what those instructions were. From this alone it would be presumed that his testimony would have been adverse to the prosecution. Yaw v. United States, 228 F. 2d 382, 383 (9 Cir. 1955). But no presumption is necessary, for on cross and redirect examination, it developed that Owens showed him the lines (3R. 521), that Upton was staying at Palmer's Cabin and coming over to Wilcox Valley to cut (3R. 520, 523), that he and his crew were actually cutting in Wilcox Valley (3R. 525), and that he actually cut 700 trees there. (3R. 518). He had, in addition, seen six "hunters" around Palmer's Cabin, "fresh stumps" 1 1/2 miles from the cabin (3R. 522), and vehicles traveling the high roads above the cabin. (3R. 523). Kirkpatrick was likewise given his orders by Owens. (3R. 549). Again, the prosecution was unwilling to ask what those orders were. On cross-examination, however, it developed that Kirkpatrick cut 300 red fir trees from the corner piece of Wilcox Meadows,

"about 30 acres". (3R. 551,552). Thus, the testimony of two persons who actually cut trees for Owens, being the Government's own witnesses, showed that their activities had been conducted on the Wilcox properties, where these cutters had every right to be.

This is the essence of the Government's case. It is supposed to lead, irresistably and beyond a reasonable doubt, to three conclusions, viz.

1. That in October, 1965, appellant Wattenburg feloniously conspired with Owens "to defraud the United States" and to "steal" and "convert" unidentified "timber" belonging to the Forest Service;

2. That "on or about October 16, 1965", "in the Plumas National Forest", Owens "stole" and "converted" "approximately 1,000 red fir ... trees belonging to the Unites States"; and

3. The appellant Wattenburg aided, abetted, counseled and commanded, etc., Owens to do so.

Merely to lay these propositions alongside the evidence demonstrates their tenuous nature. Indeed, the gossamer qualities of the supposed case against appellant

Wattenburg is best demonstrated by a fact which the trial court refused to admit in evidence (4R. 839) viz., that on December 10, 1965, one month after the investigation, the same Government lawyers who wrote the present indictment wrote and obtained another indictment which says nothing about appellant Wattenburg and nothing about any "conspiracy", but simply charges Owens alone with stealing trees. (D. Ex. M for Identification).

DISCUSSION

The judgment against appellant Wattenburg is erroneous for five main reasons:

First, neither count of the Indictment states an offense; Second, the trial court erred in denying appellant Wattenburg's motion to suppress the evidence obtained at the Hideaway by unlawful search; Third, the evidence does not support the charges made; Fourth, the trial court erred in instructing the jury; and Fifth, the trial court erred in rejecting evidence duly offered by the defense.

We discuss these points in order.

I. Count II of the Indictment Fails to State an Offense

Discussion of the two counts of the indictment in inverse order will, we believe, avoid repetition. We therefore discuss Count II first.

The rules of pleading in criminal cases and their interrelationship with the function of the grand jury have been recently reviewed and restated by the Supreme Court. Russell v. United States, 369 U.S. 749. Rather than attempt to paraphrase, we quote them:

"In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet," and, secondly, '"in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."' (369 U.S. 749, 763-764)

* * *

"To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (369 U.S. at 770).

Count II of the Indictment (1R.3) charges that

Owens

"On or about October 16, 1965, in the Plumas National Forest, County of Plumas ... did steal purloin and knowingly convert approximately 1,000 Red Fir (silver tip) trees belonging to the United States, the value of which trees exceeded the sum of \$100; and

W. H. Wattenburg,

defendant herein, did aid, abet, counsel, command, induce and procure the commission of the above acts."



This pleading, we submit, comes nowhere close to meeting the rules of the Russell case, and fails to state an offense because: (1) it is too vague to apprise of the charges to be met; (2) it would furnish no protection to a subsequent indictment; and (3) it seeks to charge the legally impossible, viz. larcency of real property.

A. Count II Fails to Apprise of what is to be Met

As the Court judicially knows, there are some 1,000,000 acres of forest land that satisfy the description "in the Plumas National Forest County of Plumas."* It is and was impossible to prepare to meet charges of aiding and abetting in some unspecified manner the stealing of "approximately 1000" red fir trees situated at some unspecified place or places within 1,000,000 acres of forest"on or about October 16, 1965", which term has here been construed by the trial court to mean any number of different days "near or close to October 16." (7R. 37).

* The situation is reflected on Standard Oil Company's road map of California, depicting Plumas National Forest in green and the boundaries of Plumas County. The great bulk of this National Forest lies in Plumas County.

For reasons best known to itself, the prosecution chose to obtain an indictment couched in the broadest and most uninformative terms possible. The Government knew what trees the cutting of which it intended to attempt to prove, because the testimony is that in November, 1965, two months before the indictment, unidentified Forest Service personnel had prepared a sketch which was received in "rebuttal" and which purports to show the areas of cutting. (P. Ex. 17; 5R. 970). Appellants were thus in the position of the defendant in Lowenburg v. United States, 156 F.2d 22, 24 (10 Cir.), where the Court said:

"The government knew this, but the accused did not know it, nor could he ascertain it from the indictment. He was completely helpless. He could only sit by and wait until the government introduced its evidence at the time of trial, and then meet it as best he could. The indictment failed to meet the minimum requirements of good pleading and was therefore legally insufficient to charge appellant with the commission of a public offense."

B. Count II Would Furnish No Protection to a Subsequent Indictment

As might be expected from an indictment in such vague terms, it is impossible to ascertain from the record what either of the appellants was convicted of under Count II. If the grand jury indicted appellant Wattenburg tomorrow for aiding and abetting Owens in the stealing of five, ten or fifty red fir trees from the Plumas National Forest, Plumas County, "on or about October 16, 1965" he would have the

benefit of the present conviction only if the record in this case shows precisely what trees Owens was convicted of stealing. But it is impossible to make this determination from the record.

First, a conviction of stealing "approximately 1000" trees is, on its face, a determination respecting an imprecise quantity and was so submitted to the jury.* Second, there is only one piece of evidence which purports to reveal, with any degree of specificity, where the "approximately 1000" trees supposedly came from. This is the sketch (P. Ex. 17) introduced in the name of "rebuttal" at the end of the trial. The scale of the sketch is one inch equals 2.5 chains, the equivalent of 165 feet. An error of 1/10 inch on the sketch is thus an error of 16 1/2 feet on the ground. The most casual inspection of the sketch shows that it would be impossible to lay out on the ground, except in the most general way, the areas marked by dashed lines and

*The instruction was (7R. 33):

"'Approximate' or 'approximately' is defined as nearly or close to as we commonly use these words or terms... I will leave to you the application of that definition..."

denominated "Christmas Tree Cut Units". No bearings or distances from any landmark to any point on the boundary of any cutting area are shown. The lines supposedly marking the cut areas are both curved and dashed. No radii of curvature are given and the boundaries between the dashes are unspecified, although the distance between the dashes in some instances represents 40 feet on the ground. There is no evidence whatever respecting what number of the "approximately 1000" trees came from any particular area marked on the sketch as a "Christmas Tree Cut Unit."

Furthermore, as appears from the Affidavit of James F. Nicklos (1R. 105), a forester who examined the ground after the melting of the snow made it possible to do so, when this sketch is taken to and compared with the ground it purports to represent, it turns out to be in many instances either totally inaccurate and in all other instances to be only the grossest kind of approximation of the actual situation. Thus, the area shown on the sketch as a supposed cutting area out of which wafer #34 supposedly came, contains neither Christmas trees nor Christmas tree stumps.* At the

* Wafer #34 is the wafer said to match the tree bearing the smudge of blue paint. (3R. 445).

same time, there are red fir Christmas tree stumps in Sections 21 and 22 from which the trees were removed during the 1965 cutting season but which are so far removed from any area shown on the sketch as a cutting area that they could not possibly be included in those areas. Still other such stumps, however, are in the general vicinity of the areas so depicted, but because of the crudities and inaccuracies of the sketch it is impossible to tell from the sketch whether they lie inside or outside these areas. The short of it is that the Government could institute any number of new proceedings against the appellant based on red fir Christmas trees taken in 1965 from Sections 21 and 22, and it would be impossible to ascertain whether the trees involved in the subsequent proceedings were the same as those involved in the present case. One can say here only what was said in Sutton v. United States, 157 F. 2d 661, 665 (5 Cir.) viz.,

"The appellant has been convicted, but of what no one can say with certainty."

C. Count II Purports to Charge the Legally Impossible viz., Larceny of Real Property

18 U.S.C. §1852 makes it a misdemeanor to cut any timber on the public lands of the United States, and 18 U.S.C. §1853 makes it a misdemeanor to unlawfully cut any tree on certain lands of the United States. But neither

is the crime here charged. The charge here under Count II is felony under 18 U.S.C. §641, and to succeed in this the Government was required to plead and prove larceny. That is the crime brought into federal criminal law by this statute, the legislative history of which is reviewed at length in footnote 28 of Mr. Justice Jackson's opinion in Morissette v. United States, 342 U.S. 246, 266.

The existence of specific and specified personal property belonging to the Government and stolen by Owens was the very heart of Count II. As stated in Moore v. United States, 160 U.S. 268, 273:

"The ordinary form of an indictment for larceny is that J.S., late of, etc., at, etc., in the county aforesaid, (specifying the property,) of the goods and chattels of one J. N. 'feloniously did steal, take, and carry away.' In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried away specified goods belonging to the person named."

The "whole gist" of a violation of §641 is absent from the Indictment.

Again, in Russell v. United States, 369 U.S. 749, 768 (1962) the Court writes:

"It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offense, coming under the general description,' with which the defendant is charged. This purpose, as defined in United States v. Cruikshank, 92 U.S. 542, 558 23 L ed 588, 593, is 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"

The Court's footnote 15, here appearing, advises that "This principle enunciated in Cruikshank retains undiminished vitality, as several recent cases attest" Hard on the heels of the rule quoted from Cruikshank in Russell, the Court there gave this example of the principle:

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny." 92 U.S. at 558.

The charge in Count II is stealing, in a National Forest, "trees belonging to the United States." The Indictment does not state that the trees were personal property*, and in ordinary speech the words "trees belonging to the United States" in a National Forest mean trees standing in the National Forest. There was not, we submit, a single grand juror who voted for the indictment who thought otherwise. The most that can possibly be said for the indictment is that it is ambiguous and uncertain, but an indictment must "without

*

And it would be immaterial if it did, because "it is not sufficient to denominate the property 'personal goods', without describing it so as to enable the Court to decide that question for itself." People v. Williams, 35 Cal. 671-675 (1868).

any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." United States v. Carll, 105 U.S. 611, 612, quoted with approval in Russell v. United States, 369 U. S. 749 at 765.

There can be no doubt that larceny under §641 is committable only in respect of personal property, and that trees are realty. In Lamb v. United States, 150 F.Supp. 310 (N.D. Cal. 1957), affirmed sub nom Magnolia Motor & Logging Company v. United States, 264 F. 2d 950 (9 Cir. 1959), the indictment, brought under 18 U.S.C. §641, charged that the defendants

"between the 1st day of June, 1953, and the 30th day of December, 1954 ... did ... unlawfully steal and convert to their own use personal property of the United States, said personal property being more particularly described as follows: Approximately 10,300 fir, cedar and hemlock logs of a value of more than \$100." (264 F.2d at 951.)

Judge Halbert denied a motion to dismiss, saying (150 F.Supp. at 313, 314):

"Section 641 applies only to the stealing or conversion of personalty belonging to the United States ... It is fundamental that standing timber (This Court can see no legal distinction between growing trees and standing timber)* is classified as realty, United States v. Shoshone Tribe of Indians,

As we show at pages 42-46, infra, there is a distinction, but on this branch of the case, and on the case before Judge Halbert, the distinction is and was irrelevant.



304 U.S. 111 ... and Capoeman v. United States, D.C., 110 F.Supp. 924; hence §641 (relating to personalty) could not be applied.... With the aforementioned points of difference in mind, the Court is of the view that Congress did not intend to preclude the application of the general larceny statute, §641, where the taking of logs is involved ..."

Footnote 2 to Judge Halbert's opinion refers to another case decided by the late Judge Alger Fee. It reads as follows (150 F.Supp. at 314):

"Defendants have called to the attention of the Court the case of United States v. Simpson, Cr. No. 17,903, in the United States District Court, for the District of Oregon, wherein the District Court there dismissed an Indictment for a violation, inter alia, of §641 charging the defendant with unlawfully, wilfully, feloniously and knowingly embezzling, stealing, purloining and converting to this own use a quantity of standing timber valued in excess of \$100 located on lands owned by the United States. Defendants' contention that the ruling in the Simpson case is determinative of the issues in the case at bar is without merit for the obvious reason that the Indictment in the case at bar does not attempt to make the theft or conversion of standing timber a violation of §641, but, on the contrary, charges defendants with the theft and conversion of logs, which under ordinary nomenclature, signifies severed timber (and therefore personal property), not standing trees." (Emphasis in the original)

Defendants in Lamb were convicted, and this Court affirmed, saying (264 F.2d at 954):

"The evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property." (Emphasis supplied)



The significance of the underscored language will soon appear. We momentarily digress, however, to this Court's decision in Chappell v. United States, 270 F.2d 274 (9 Cir. 1959).

Chappell was a Master Sergeant in the Air Force.

The charge was that he violated 18 U.S.C. §641 in that he feloniously "converted to his own use" the services of an airman by making him paint Chappell's apartments when he should have been on duty for the Government. He was convicted and appealed, assigning various errors. This Court considered none of them. Instead, it reversed on a point no one had made, viz., that 18 U.S.C. § 641 could not, as a matter of law, apply. After noting that Morissette limits § 641 to "stealing, larceny and its variants and equivalents" the Court continued:

"It is undoubtedly true that in some senses the master's right to the services of his servant may be regarded as property or as a thing of value, but the utilization of such services by a stranger has never been known to be comprehended within the definition of statutes dealing with larceny, theft, or their 'variants and equivalents.' Thus Blackstone defines larceny as follows: 'Larceny is the felonious taking and carrying away of the personal goods of another.'" (270 F.2d at 276, 277)

* * *

The question then is whether the revision of Title 18 in inserting in §641 the words 'whoever * * * converts to this use, or the use of another * * * any * * * thing of value of the United States * * *' was intended so to enlarge the original import of the revised sections...." (270 F.2d at 277)

* *

"The mere importation of the words 'convert to his own use' cannot be held to have brought about that result" (270 F.2d at 277)

* * *

"We cannot believe that in importing the new words 'knowingly converts' Congress meant that the subject of the conversion should be of any different type than the subject of larceny or that it could be of other than personal goods." (270 F.2d at 277)

* * *

"... the word 'convert' has a long history in the law, throughout which it has always been used in connection with interferences with goods or personal chattels." (270 F.2d at 277)

* * *

"As Congress must have known, the word 'converts' and 'conversion' really have their origin in the law of torts. The terms imply a dealing with goods or personal chattels." (270 F.2d at 277)

* * *

"It is plain that such is the ordinary sense of the word 'convert'; and that in using the words 'converts to his use' in this section, Congress did not envision any such revolutionary concept as that which underlies the attempted prosecution under Count I. We construe a section defining a crime. As such it must be strictly construed." (270 F.2d at 278).

Just as this Court found Mr. Justice Blackstone instructive in the Chappell case, supra, so is he here. After giving at Book IV, c. 17, star page 229, the definition of larceny quoted by this Court, viz., "the felonious taking and carrying away of the personal goods of another," he continues three pages later, at star pages 232-233:

"§272. (d) Subjects of larceny. -- This felonious taking and carrying away must be of the personal goods of another; for if they are things real, or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass, which depended on the subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of anyone but of him who committed the trespass. He could not in strictness be said to have taken what at the time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and comes again at another time, when



they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner, or anyone else, has severed them." (All emphasis in the original.)

The authorities fully support this statement. E.g., Udal v. Udal (King's Bench, 1648) Aleyn 81, 82-83, 82 Eng. Rep. 926, 927; Emmerson v. Annison (King's Bench, 1672) 1 Mod. 89, 86 Eng. Rep. 755; Lee v. Risdon (Common Pleas, 1816), 7 Taunt. 188, 129 Eng. Rep. 76, 77. It is now apparent what this Court meant in the Magnolia case when it said (264 F.2d 954):

"The evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property."

In various States of the United States the common law rule respecting larceny of trees has been changed, in whole or in part, by statute. (E.g. N.Y. Penal Code §537, People v. Gallagher, 58 Misc. 512, 111 NYS 473, 475; Cal. Penal Code §495.) But it takes a statute to do it.* This is perfectly illustrated by People v. Williams, 35 Cal. 671, decided in 1868. The defendant, having been convicted of

* E.g., State v. Collins, 188 S.C. 338, 199 S.E. 303 (1938); State v. Jackson, 218 N.C. 373, 11 S.E. (2d) 149 (1940); Stansbury v. Luttrell, 152 Md. 553, 137 Atl. 339, 342 (1927); Commonwealth v. Tluchak, 166 Pa. Super. 16, 70 Atl. 2d 657, 658, f/n2 (1950), all holding the common law rule still in force absent a statute changing it.

grand larceny, moved in arrest of judgment, the motion was granted and the prosecution appealed. The indictment charged that defendant

"did unlawfully and feloniously take, steal, and carry away from the mining claim of Brush ... Company fifty two pounds of gold-bearing quartz rock, the personal goods of said Brush ... Company of the value of four hundred dollars."

The Supreme Court affirmed the arrestation of judgment

(35 Cal. at 674, 675):

"The indictment...is entirely silent as to whether the rock was a part of a ledge, and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it. In either case it might be true, as alleged in the indictment, that the defendant did 'steal, take, and carry away ... fifty-two pounds of gold-bearing quartz rock'; and yet, in the first event it would be only a trespass, whilst in the latter it would be a larceny, as these offenses have been defined by numerous authorities. But an indictment should be capable of no such double interpretation."

After reviewing the "subtle reasoning in respect to the difference between trespass and larceny in this class of cases", the Court concludes (35 Cal. at 676, 677):

"We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas, if he had taken them from the ground, after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich gold-bearing rock with felonious intent should only be a trespass, if the rock be immediately carried off; but if left on the ground, and taken off by the thief a few hours later, it becomes



larceny. The more sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and if he then removed it, with a felonious intent, he would be guilty of a larceny, whatever dispatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions; and we have adverted to the question mainly for the purpose of directing the attention of the Legislature to a subject which appears to demand a remedial statute.

Four years later, in 1872, the California Legislature adopted Penal Code § 495, which reads:

"SEVERING AND REMOVING PART OF THE REALTY DECLARED LARCENY. The provisions of this Chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time."

Congress has never seen fit thus to expand the crime of larceny to trees, doubtless because the forests of the Government are protected by numerous other statutes. E.g., 18 U.S.C. §1852; 18 U.S.C. §1853; 18 U.S.C. §1863. And, at this juncture, the words of Mr. Justice Jackson in Morissette v. United States, supra, repeated by this Court in Chappell, supra, are appropriate:

"The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which



it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.
(342 U.S. at 263).

II. Count I of the Indictment Fails to State an Offense

If such a thing is possible, Count I is even more vague and sweeping than Count II, and is a nullity for the same reasons. Count I charges that the appellants conspired (1R. 2):

"to defraud the United States and to commit offenses against a law of the United States, to wit: 18 U.S.C. 641, to steal and knowingly convert to their use timber of the Forest Service of the United States Department of Agriculture of a value in excess of \$100."

Despite the fundamental rule that fraud must be pleaded with particularity, there is no statement of any kind as to how the United States was "defrauded" - doubtless because the case has nothing to do with defrauding the United States. (See pages 41-42, infra). And there is no statement identifying the "timber" conspired to be stolen, either as to its nature or its location. One can thus appreciate the trial Court's statement that "this could be, as far as I know, about the sale of Manhattan Island." (2R. 55).

The word "timber" has many meanings. Although it does not embrace Christmas trees (see pages 42-47, infra), it

commonly means large standing trees usable for lumber. If this is what Count 1 refers to, it founders on the same shoal as the substantive crime of larceny of trees, and is analagous to a charge of conspiracy to rape one's own wife. But as stated in O'Malley v. United States, 227 F. 2d 332, 335:

"defendants could not be convicted under 18 U.S.C. §371 for conspiracy to commit acts which for any reason did not constitute an offense against the United States."

Accord: Lubin v. United States, 313 F.2d 419, 422 (9 Cir).

"Timber" may also be construed to be some form of personal property, i.e. down trees, logs, large boards, etc. And thus the charge is conspiracy to steal some wholly undefined property, real or personal, which may be located anywhere. We are in the realm of pure speculation, and to hold such an Indictment good would render the Fifth Amendment's provision respecting indictment by grand jury meaningless.

III. The Trial Court Erred in Denying the Motion to Suppress Evidence

As previously noted (supra, p. 16), appellant Wattenburg moved not once but twice to suppress the evidence that was the core of the prosecution's case viz., the wafers taken from the nine trees seized, after a 6 1/2 hour search, from the pile of trees in the back yard of the Hideaway.



The crucial nature of this evidence is best illustrated by the impact it had on the trial judge. Thus:

"The Court: How does he explain the nine matches in his backyard?" (6R. 1348)

"The Court: ... you can't explain those nine trees in Mr. Wattenburg's backyard ..." (6R. 1370).

It was fundamental error for the trial judge to refuse to suppress this evidence.

We may immediately put aside as irrelevant cases dealing with searches conducted pursuant to a validly issued warrant, with searches made incident to a valid arrest, and with those involving the search of automobiles. The purported warrant was concededly invalid(p. 12, supra), no one was arrested before, during or after the search, and the thing searched was a large pile of Christmas trees which obviously could not be quickly spirited away. Smith v. United States 335 F. 2d 270, 273 (D.C. Cir.). Also irrelevant are cases where the officer, merely by using his eyesight, immediately identifies an object as contraband, i.e., cases in which there is no search at all, because the thing to be taken is plainly visible. Here the whole purpose of Adams going with his men to the Hideaway was to search through the pile to ascertain whether they could find any evidence, and it took many hours to do so.

The prosecution's claim below was that the protection of the Fourth Amendment does not extend to the land

surrounding a house, such land being subject to search without a warrant by virtue of the "open field" doctrine. There is undoubtedly dicta to this effect in old cases. E.g., Feldman v. United States, 104 F.2d 255, 256 (3 Cir. 1939). But if this ever was the law it is not today.

We are not here dealing with a still located 1/4 mile or 250 yards from a house. Cf. Koth v. United States 16 F. 2d 59 (9 Cir. 1926). United States v. Hassell, 336 F.2d 684 (6 Cir. 1964). Here, the pile of trees was immediately adjacent to appellant Wattenburg's residence, and the land was so close to the house as to warrant the trial court's appellation "back yard." The Fourth Amendment applies to an automobile parked in a farmyard close to the farm house (Kroska v. United States, 51 F.2d 330, 333 (8 Cir. 1931), to a barn 70-80 yards from a house (Walker v. United States, 225 F.2d 447 (5 Cir. 1955)), to a smoke-house 75 feet from a residence (United States v. Mullin, 329 F.2d 295 (4 Cir. 1963)) and, of course, to a back yard. Hobson v. United States, 226 F.2d 890, 894 (8 Cir. 1955).

The prosecution's position was that it might have its cake and eat it too. It early claimed that because of the presence of the nine trees seized from the stockpile, appellant Wattenburg was in possession of stolen property, raising a

presumption of guilt (3R. 574). The prosecution then sought (5R. 1064) and the Court gave (7R. 40) instructions permitting conviction on the basis of inferences to be drawn from the possession of stolen property. Then, from the other side of its mouth, and to avoid the suppression of the nine trees, the prosecution implied that these trees were remote from appellant Wattenburg because supposedly in an "open field". If an object is sufficiently in a citizen's possession to raise presumptions of felony against him, it is, we submit, sufficiently in his possession to require a search for it to be conducted pursuant to a valid warrant or a valid arrest.

IV. The Evidence Does Not Support The Conviction on Count I.

Even if it be assumed that Count I states an offense and that the motions to suppress were properly denied, the conviction on Count I must be reversed because it is not supported by the evidence.

Count I charges a conspiracy "to defraud the United States" and "to steal and knowingly convert timber of the Forest Service". The evidence will not support either claim.

A. The Evidence Shows no Conspiracy to Defraud the United States.

This case has nothing whatever to do with defrauding the United States, as the trial court recognized when, with the

agreement of all parties, it struck from Count I the language "to defraud the United States and" (5R. 1049,1050). To conspire to defraud the United States means primarily "to cheat the Government out of property or money," or to defeat its official action "by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention". Hammerschmidt v. United States, 265 U.S. 182, 188.

There is no evidence that either defendant had any communication of any kind with any representative of the Government until Adams and his helpers had been searching for hours at the Hideaway for trees the Government had already lost. There is no evidence of any agreement to make any representation, or otherwise, to any agent of the Government. As stated in the Hammerschmidt case, "one would not class robbery or burglary among frauds." (265 U.S. at 188). Neither would one so classify cutting trees on Government land.

B. The Evidence Shows No Conspiracy to Steal Timber.

Just as this case has nothing to do with defrauding the United States, it has nothing to do with "timber". This case has to do with Christmas trees, and such trees are not timber.

As appears from pages 34-36 of Volume XI of the Oxford English Dictionary (1R. 87-89), the word "timber"

derives from words of ancient languages which either directly meant or suggested building.*

The meanings of "timber" given by the O.E.D. demonstrate that the word does not mean any and all trees in general, but only certain good-size trees which can be used for building.

And so it is in law. A recent text is Falk, "Timber and Forest Product Law" (1958). The preface advises that

"Three principal sources were used to gather and check the material in this book: (1) Foresters, (2) attorneys, and (3) every reported American decision involving timber--several thousand cases."

His preface also notes that

"Particular credit must also go to the United States Forest Service office in Washington, D.C. ..."

At page 71 of his book, Falk states the law as follows:

"'Timber' alone has been defined as wood proper for building and the manufacture of other useful items. It does not include saplings, brush, fruit trees, or trees suitable only for firewood or decoration."

At page 74, he notes that "Specific questions usually arise in trying to determine the meaning of the word 'timber',

*

Thus the Greek "dem-ein", to build; the Latin "domus", house; the Indo-European "demro", from the ablaut series "dem", "dom", "dm", to build; the Gothic "timr", itself the root of the Gothic "timr-jan", to build, and "timr-ja", a builder.

i.e., ... Does it include ... (d) firewood, brush, Christmas trees?" This question he answers on the following page, as follows:

"(d) Does it include firewood, brush and Christmas trees? There has been previously discussed in detail the fact that these items are not generally considered as being timber, and therefore would not be included. Neither would fruit trees, except whether they were to be used for making furniture or the like."

The cases support Falk completely. Thus, Arbogast v. Pilot Rock Lumber Co. (1959), 215 Ore. 579, 336 P.2d 329, 332:

"In the absence of modifying terms or expressions in the instrument or a construction peculiar to the locality, the general rule within the lumber industry is that the word 'timber' denotes trees of a size suitable for manufacture into lumber for use in building and allied purposes. It does not, however, include saplings, brush, fruit trees or trees suitable only for firewood or decoration. [Many citations]"

Accord: Union Bag & Paper Corporation v. Mitchell, 177 F. 2d 909, 912 (5 Cir., 1949); United States v. Schuler (C.C. Mich. 1853), 27 Fed. Cas. No. 16,234; Buffum v. Texaco, Inc., 241 C.A. 2d 732,735 (1966).

One might speculate that the U.S. Forest Service uses the word "timber" in some peculiar and artificial way. But this is not so, as the Regulations dealing with Forest Service "timber" make plain. These are contained in Part 221 of Title 36 of the Code of Federal Regulations. By way of example, Reg. 221.2 provides that

"Each sale or other use of national forest timber will be authorized only after the approving officer is satisfied that practicable fire-prevention measures and methods of cutting and logging are prescribed which will preserve the residual living and growing timber, promote the younger growth...etc."

To speak of "logging" Christmas trees is nonsense. Again Reg. 221.3(c) says:

"Timber cut from the national forests in Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester..."

To speak of "manufacturing" operations to be performed on Christmas trees is absurd. Again, Reg. 221.4(b) authorizes the Chief of the Forest Service, in the interest of maintaining "stable communities", to

"offer national forest timber for sale to responsible operators...who will manufacture the timber to at least a stated degree within the community or communities to be maintained."

Again, Reg. 221.6(b) provides that

"The Chief, Forest Service, is authorized to make timber sales for any amount on any national forest... He may delegate and provide for redelegation of this authority to subordinates for amounts not exceeding in any one sale, 50 million feet board measure, or the equivalent thereof."

It is fantasy to speak of Christmas trees in terms of board feet. As Ranger Kennedy testified, Christmas trees are measured and priced in terms of lineal feet (2R. 221).



Both the Congress and the Forest Service know that everything in the forest is not "timber". Thus, 16 U.S.C. §471, the basic authority for setting aside national forests, speaks of "public lands wholly or in part covered with timber or undergrowth". 16 U.S.C. §476 speaks in terms of "timber and cordwood and other forest products". Again, 16 U.S.C. § 491 speaks of "timber and other forest products", and 16 U.S.C. §493 permits the Secretary of Agriculture to furnish "young trees" free to certain persons. The following question by Government counsel and answer by Ranger Kennedy sum the matter up (2R. 203,204):

"Q. Now, as a Timber Management Officer, Mr. Kennedy, do you have occasion to act as a Government representative in the sale of timber and other vegetative growth in this area?

"A. Yes."

We submit that, as a matter of law, Christmas trees are not "timber", and that there is no evidence of a conspiracy to steal timber.

V. The Evidence Does Not Support the Conviction on Count II.

Appellant Wattenburg was charged in Count II as an aider and abettor. He could not therefore, be convicted under this count unless the crime which he was charged with abetting was actually committed. Karrell v. United States, 181 F.2d 981, 985 (9Cir. 1950).

The crime allegedly aided and abetted supposedly took place "in the Plumas National Forest". We allude to this fact because the prosecution, pointing to the averment of "conversion," made much of the storing of trees at the Hideaway, and sales of trees there made. These acts however, obviously took place after whatever was done in the Forest, and therefore could not constitute aiding or abetting. Rizzo v. United States, 275 Fed. 51 (3 Cir. 1921); Johnson v. United States, 195 F.2d. 673,675 (8 Cir. 1952).

The crime allegedly committed by Owens was stealing "1000...trees belonging to the United States, the value of which trees exceeded the sum of \$100." If this Count charges any violation of 18 U.S.C. §641 whatever, to prove it requires evidence of the taking, at one time, of personal property of the value of \$100. Value is an essential element (Stevens v. United States, 297 F.2d. 664 (10 Cir. 1961); Ransom v. United States, 337 F. 2d. 550 (D.C. Cir. 1964)), because unless the value of the thing taken is \$100, the crime is not felony. 18 U.S.C. §§1,641. But there is no evidence of either of these facts.

A. There is no Evidence of a Taking of Personal Property

There is no evidence as to the mechanics by which any trees were removed from the Government's land. A Christmas tree is readily portable. There is no evidence that the trees were



cut and then left to lie on the land - and thus become the Government's personal property. To cut trees and not immediately remove them would obviously increase the risk of apprehension. Indeed the prosecution's theory was that cutting had been done close to roads (6R. 1304), thus facilitating speedy ingress and egress. Whether there was any personal property in the possession of the Government lies in the realm of pure speculation, and no one could find, must less find beyond a reasonable doubt, that such property existed.

B. There is no Evidence of the Taking, in a Single Larceny, of \$100 Worth of Trees

If it be assumed that trees were cut and left to lie so as to become the subject of larceny, there is no evidence that \$100 worth of trees were taken in a single larceny.

According to the Government's valuation witness, Ranger Kennedy, the value of the missing trees was 75 cents per lineal foot. (2R. 221). It is thus obvious that no single tree - indeed no ten trees together - could be worth \$100. In the nature of things, trees had to be moved out of the forest by hand to vehicles, and no one could possibly carry \$100 worth of Christmas trees at once. The crime of larceny, however, is committed and completed by "the least removing of the thing taken from the place it was before with intent to steal it."

Rutkowski v. United States, 149 F. 2d. 481, 483 (6 Cir. 1945). These trees had to have been taken a few at a time, and in amounts worth less than \$100. To arrive at a value of



\$100, small amounts must be aggregated, and this is impermissible. Cartwright v. United States, 146 F. 2d 133 (5 Cir. 1944).

There is evidence that there were nine Government trees in the stockpile at the Hideaway. There is also evidence that there were, at a maximum, 450 "freshly cut" trees in the stockpile, made up of unspecified numbers of red and white fir. But no one could find from the evidence beyond a reasonable doubt, or indeed at all, that Owens, in a single larcency, stole 1000 Government red fir trees, or even \$100 worth of Government red fir trees.

VI. The Trial Court Erred In Instructing the Jury

1. The Giving of the Instruction Respecting Defrauding the United States

This case so obviously had nothing to do with defrauding the United States that, during the instruction conference, it was agreed that the words "to defraud the United States" should be stricken from the Indictment. (5R. 1049, 1050). Subsequently, and to avoid the problem of Carney v. United States, 163 F. 2d 784 (9 Cir.), this language was restored to the Indictment. The Court then, in instructing the jury, read Count I of the Indictment in its original form (7R. 17), and gave the following instruction (7R. 19, 20):

"You will recall that the indictment alleges two possible objects of the conspiracy. Before you would be entitled to return a verdict of guilty on Count One, you must find that at least one of these purposes was contemplated by the conspirators.

The first purpose alleged is 'to defraud the United States.' In this regard, you are instructed that a transaction or course of conduct is designed to defraud the United States if it is done with the intent to deceive an agency or department of the Government. Whether or not a Government agency was actually deceived, or suffered monetary loss, is immaterial."

This charge is both erroneous and completely unsupported by the evidence. It was highly prejudicial, and was duly excepted to. (6R. 1326-1327).

Under this instruction, a conspiracy to defraud the United States may be found upon any act done "with intent to deceive an agency or department of the Government," even though the Government has neither taken nor been asked to take any action of any kind, or awarded or been asked to award any right, privilege or status on the basis of any communication, representation or act on the part of any alleged conspirator, and has never relied on anything said or done by anyone. This instruction totally eliminated, from the crime of conspiracy to defraud, the concept of defrauding.

The evidence in this case respecting conspiracy was extremely nebulous. This "defrauding" instruction followed hard on the heels of a summation by counsel for the prosecution in which characterizations of "deceit" (6R. 1257) and "deception" (6R. 1264) were applied to transactions having nothing to do with the Government. Under this instruction, the jury was permitted to convict on a theory which was both erroneous and

had no support in the evidence.

Appellant Wattenburg proposed an instruction to take this question out of the case. (5R. 1113). It was not given, and the trial court declined to hear any objections to instructions not given. (6R. 1323).

2. The Refusal of Appellant Wattenburg's Proposed Instruction 13

This proposed instruction (8 Tr.) reads as follows:

"Charges of conspiracy cannot be made out by piling inference upon inference, for to do so would fashion a dragnet to draw in all substantive crimes."

This is a direct quotation from Direct Sales Co. v. United States, 319 U.S. 703, 711, cited at the foot of the instruction. This instruction was not given and, as just noted, the trial court declined to hear any objections respecting instructions refused. (6R. 1323).

A conspiracy case like this one, based purely on circumstantial evidence, is one fraught with peril for any defendant, no matter how innocent, for in such a case anything proves anything. As Mr. Justice Jackson so well put it, "the modern crime of conspiracy is so vague that it almost defies definition", and is "a scatter-gun to bring down the defendant." Krulewitch v. United States, 336 U.S. 440, 446, 452. In such a case, we submit, the defendant is entitled to have the jury cautioned by the type of instruction proposed.



VII. The Trial Court Erred in Refusing to Admit
the Prior Indictment

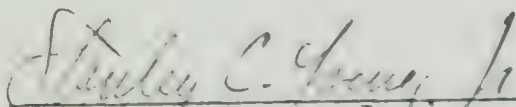
On December 10, 1965, over one month after the investigation and search at the Hideaway, the same Government counsel who obtained the Indictment underlying the present proceeding prepared and obtained another indictment. (D. Ex. M for identification). This prior indictment says nothing of appellant Wattenburg and nothing of any "conspiracy", but simply charges Owens with stealing trees.


The trial court refused to receive this prior indictment in evidence. (4R. 839). This document is a formal statement, by the officers of the Government in charge of the matter, that long after the facts were known to them they had insufficient basis to believe that appellant Wattenburg conspired with Owens or participated in any other manner in his alleged wrongdoing. The jury, we submit, was entitled to have this evidence before them in considering whether, as the prosecution later contended, the evidence compelled the conclusion that appellant Wattenburg was guilty of felonies committed with Owens.

CONCLUSION

We respectfully submit that the judgment of conviction of appellant Wattenburg should be reversed, with directions to dismiss the Indictment.

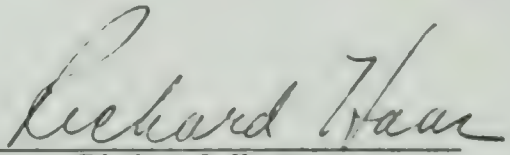
Dated: March 24, 1967.


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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Richard Haas

JUL 24 1957

NO. 21301

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

W. H. WATTENBURG and
WILLIAM P. OWENS,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

REPLY BRIEF OF APPELLANT WATTENBURG

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FILED

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Appellee.

REPLY BRIEF OF APPELLANT WATTENBURG

We reply to the several points of appellee's brief in the order there stated.

I. Count II of the Indictment
Fails to State an Offense.

A. Count II Fails to
Apprise of What is
to be Met.

Appellee first urges that appellant's
remedy was a bill of particulars. (B.A. 14)*. This was

* The notation B.A. " refers to appellee's brief. The notation "A.O.B. " refers to the opening brief of appellant Wattenburg.



precisely the argument rejected in Russell v. United States, 369 U.S. 749, 770 (1962). The scope of Count II is so sweeping as to make it a virtual blank check, and a bill of particulars here would have been a charge by the prosecuting attorneys and not by the grand jury. See p. 11, infra.

Appellee next points to the pretrial motion of appellant Wattenburg to suppress evidence, and asserts that Wattenburg "knew from the outset what trees the Government was talking about and from whence they came." (B.A. 15). This is a distortion of the record. In November, 1965, Investigator Adams and Ranger Kennedy went to the Frank Palmer cabin and took from the premises a group of white fir Christmas trees which were stored there and which, as it turned out, had nothing to do with the case. (2 R. 237-238). Wattenburg, however, laboring under the impression that the Government would not take his property without reason and that these trees therefore had some relevance, moved before trial to suppress "Stumps No. 6, 7, 10, 24, 25, 28, 34, 35 and 36 taken from the real property known as Frank's Cabin". (1R. 14). As appears from P. Ex. 17, which was disclosed only at the end of the trial (5R. 951), none of these stumps had come from the trees taken from the Cabin, but from stumps located at different places in Sections 22 and 23. Contrary to appellee's assertion (B.A. 15, f/n), the so-called "theft



area" was never discussed at the hearing of the motion to suppress. (2 R. 2-34). It was there developed that Investigator Adams went to the Cabin (2 R.4) and there obtained evidence which he turned over to the United States Attorney. (2 R.6). But this "evidence" was the trees taken from the Cabin property which had nothing to do with the Government's case.

Going completely outside the record, appellee asserts that prior to trial Wattenburg sued Investigator Adams "alleging damages as a result of the said Adams' search of the theft area." (B.A. 15, f/n). This is also a gross distortion. Wattenburg sued Adams for breaking in to the mining claim and taking from the Cabin property the trees there stored - trees which were concededly Wattenburg's property. (2R. 238).

The claim that Wattenburg knew what trees the Government claimed to be stolen or where they came from is made out of whole cloth. Indeed, the record demonstrates that Wattenburg believed that the case involved trees which were his and which were unlawfully taken from the Cabin property by Adams.

B. The Record Would Not Protect
 Against a Subsequent Prosecution
 Under Count II

We have no quarrel with appellee's statement that it is the record which determines the extent to which a former conviction bars a subsequent prosecution. We so stated the matter in our opening brief. (A.O.B. 23-24).

It is P. Ex. 17 which purports to show the locations from which the trees were taken. Wholly without respect to the affidavit of the forester, Nicklos, a mere visual inspection of the exhibit demonstrates that it would be impossible to lay out on the ground the boundaries of the "Christmas tree cut units" or, with the exception of the nine numbered stumps, to ascertain what trees came from what areas. There is no evidence fixing the number of trees coming from any of these areas. All that appears is that from seven crudely sketched areas 1033 trees were missing.

Appellee suggests that appellants would have a good plea of former jeopardy in respect of a theft of any red fir tree taken from any part of Sections 21 and 22 in 1965. (B.A. 17). This could be so only if the record showed that these two entire Sections were denuded of all such trees. There is, of course, no such evidence, and appellee never made, or intended to make, any such claim.

* Appellee asserts that this affidavit "consists largely of hearsay statements." (B.A. 17). The document (I R. 105-116) is strictly limited to the personal observations of the affiant.

** The vagaries of the matter are well illustrated by the testimony cited by appellee. Thus, (2 R. 59):

"... about, oh, 75 yards up the hill I noticed fresh cutting ... I quick made an estimation of the amount of trees cut and there were approximately 75 to 100 trees in that particular area."



C. 18 USC §641 Does Not
 Extend to Real Property

Appellee advances two arguments for the proposition that 18 USC §641 extends to real property. (B.A. 17-23). First, appellee notes that the codifiers were concerned with the gaps and crevices separating particular larceny-type offenses at common law. Next, appellee urges that a word "steal" embraces the concept of taking real, as well as personal, property. These arguments lack substance.

A basic datum point in construing 18 USC §641 is that "the 1948 Revision was not intended to create new crimes, but to recodify those then in existence." Morissette v. United States, 342 U.S. 246, 269, f/n 28 (1952). Continuously since the First Congress there have been federal statutes denouncing stealing, embezzling and purloining.^{*} If these crimes had any application to real property appellee could certainly produce at least one federal case where there had been a prosecution for stealing such property. It does not do so, and our research discloses none.

*

See, e.g., the Act of April 30, 1790, 1 Stat. 112, 116, Section 16 of which provided in part:

"That if any person ... shall take and carry away, with an intent to steal or purloin the personal goods of another; or if any person ... shall for any lucre or gain ... embezzle, purloin or convey away any of [certain materials of war] he shall ... be fined ... and be publicly whipped..."



The distinction between real and personal property is a fundamental one, not only in the law of crimes but in all fields of law, and the "gaps and crevices" in the larceny type offenses have nothing to do with this fundamental difference. These "gaps and crevices" are specifically identified in Morissette, 342 U.S. at 273, footnote, as those resulting from the distinctions between common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement. These crimes are merged into 18 USC §641, but none is commissible in respect of real property.

Appellee's argument that the word "steal" enlarges the statute to embrace the taking of real property is shown to be unsound by the very cases it cites. In United States v. Turley, 352 U.S. 407 (1957) the Court quotes both from Black's Law Dictionary and from United States v. Adcock, 49 F. Supp. 351, 353 (W.D. Ky. 1943). The quotation from Black's (352 U.S. at 412) is that "'steal' 'may denote the criminal taking of personal property either by larceny, embezzlement or false pretenses.'" The quotation from Adcock, as relevant, is (352 U.S. at 411, f/n 6):

"... the word "stolen" is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law ..."



Appellee next quotes from Boone v. United States, 235 F.2d 939 (4 Cir. 1956), but immediately preceding the quoted language the opinion states (235 F.2d at 940):

"... we adopt the definition given by Judge Miller in United States v. Adcock", and then quotes it as we have done above. This very Court, the Ninth Circuit, has adopted the Adcock definition of "steal". Smith v. United States, 233 F.2d 744, 747 (9 Cir. 1956). It is thus apparent that the use of the word "steal" in 18 USC §641 works no such extraordinary expansion in respect of the larceny type offenses as appellee here argues for.

Appellee notes that Congress is not obliged to maintain common law distinctions between grand and petty larceny. (B.A. 21). But the question here is not whether Congress might obliterate the distinction between real and personal property in the larceny type offenses, but whether it has done so in 18 USC §641. We submit that it has not.

* The State cases lend little support to appellee's theory. Only two cases, both involving fences, aid appellee. Stephens v. Commonwealth, 304 Ky. 38, 199 SW 2d 719 (1947); Harberger v. State, 4 Tex. Civ. App. 26, 30 Am. Rep. 157 (1878). The federal cases hold that taking fences is not larceny. United States v. Wagner Fed. Cas. No. 16,630 (C.C.D.C. 1806); United States v. Smith, Fed. Cas. No. 16,325 (C.C.D.C. 1807). In McKenna v. State, 119 Fla. 576, 161 So. 561 (1934) the property taken was personalty under local law. Summerlin v. Orange Shores, Inc. 97 Fla. 996, 122 So. 508, 510 (1929). The same was true in Junod v. State, 73 Neb. 208, 102 N.W. 462 (1905). In State v. Donahue, 75 Ore. 409, 144 Pac. 755 (1914) the charge was stealing "500,000 feet of sawlogs", i.e., the case is the same as Magnolia Motor & Logging Company v. United States, 264 F.2d 950 (9 Cir. 1959).

Appellee urges that Count II alleges an offense since severed trees ultimately become personal property. (B.A. 23). But Count II says nothing about severed trees. Indeed, appellee urges that the first overt act of Count I "was explanatory of" the conspiracy count (B.A. 25), and that "the first overt act in Count I specified red fir trees, as does Count II." (B.A. 32). The first overt act of Count One states that Owens "cut and removed a quantity of Red Fir (silver tip) trees" (I R. 3), a plain reference to standing trees. Appellee finds it "difficult to imagine how trees can be described other than by their specie." (B.A. 23). But if such a case had actually been put to the grand jury, it would be simple enough to allege the taking of severed trees, lying on the Government's land and in its possession. Appellee argues that because trees "can ... become objects of larceny" an averment of stealing "trees" simpliciter is justified. (B.A. 23-24). This does not square with the authorities, which appellee ignores. (A.O.B. 27-28). One could with equal logic argue that an indictment alleging the sale of "a white powder" charges a violation of a narcotic statute because a white powder "could be" heroin. Finally, appellee advances the extraordinary argument that it was the burden of the defendants to prove that the trees were not personal property! (B.A. 24). But we are not dealing here with a proviso or exception to a statute or

regulation. The appellee had the burden on each essential element of the offense (Newsom v. United States, 335 F.2d 237, 239 (5 Cir. 1964)), and the existence of specific and specified personalty is such an element in an alleged violation of 18 USC §641. (A.O.B. 27-28). We will have to adopt an entirely new legal system before a defendant must prove that he is not guilty of stealing because the goods allegedly stolen did not exist. See Karn v. United States, 158 F.2d 568, 571 (9 Cir. 1946).

II Count I of the Indictment
Fails to State an Offense

As appellee notes (B.A. 28-29), Count I of the indictment proceeds on two different bases, viz., a conspiracy to defraud the United States and a conspiracy to violate 18 USC §641 by stealing timber. The jury was instructed, over appellants' objection, on both bases, and advised that appellants could be convicted on either. (A.O.B. 49).

In respect of the conspiracy to defraud charge, the entire averment is that (I R. 2):

" on dates to the Grand Jury unknown during October, 1965, in the County of Plumas ...

W.H. Wattenburg, and
William P. Owens,

defendants herein, did conspire together and with one another and with others to the Grand Jury unknown to defraud the United States ..."

This is, of course, simply a charge in the language of the statute.

There is no crime of "defrauding the United States", and a charge of conspiracy to defraud the United States is a mere legal conclusion. Furthermore, this is not a self-describing offense like failing to file a particular income tax return or robbing a certain bank. Numberless factual situations may be shown in support of a charge of conspiracy to defraud the United States. (See pp. 17 to 19, infra.) This being true, an indictment simply reciting the language of the statute gives no notice and is invalid. As stated in United States v. Hess, 124 U.S. 483, 487 (1888), quoted with approval in Russell v. United States, 369 U.S. 749, 765 (1962):

"Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."

In Hess the prosecution was based on R.S. §5480, a statute "directed against 'devising or intending to devise any scheme or artifice to defraud' to be effected by communication through the post office." 124 U.S. at 486. Defendant there was charged in the language of the statute, and the pleading held bad because, just as here, there was an "absence of all particulars of the alleged scheme." Ibid.

Appellee urges that in conspiracy cases no details



need be given, citing Glasser v. United States, 315 U.S. 60 (1942). There, however, the manner and means which defendants agreed to employ to defraud the United States were fully set forth in the indictment. 315 U.S. at 66. Details of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of the conspiracy are not essential, but the manner and means must certainly be stated with sufficient particularity to give some idea of the nature of the scheme to "defraud." Pettibone v. United States, 148 U.S. 197, 203 (1892), cited with approval in the Russell case. (369 U.S. at 765).

A bill of particulars cannot save an invalid indictment. Russell v. United States, 369 U.S. 749, 770 (1962); United States v. Seeger, 303 F.2d 478, 484 (2 Cir. 1962). An indictment charging simply that A and B "conspired to defraud the United States" places virtually no limits upon the prosecution in furnishing a bill of particulars, substitutes the prosecuting attorney for the grand jury, and permits conviction "on the basis of facts not found by, and perhaps not even presented to the grand jury." 369 U.S. at 770. As stated in Van Liew v. United States, 321 F.2d 664, 672 (5 Cir. 1963):

" ... the District Attorney is not the Grand Jury, and he may not determine what it is that the Grand Jury has charged."

The doctrine of aider by verdict, urged by appellee (B.A. 26), applies only to matters of form, not to matters

of substance. United States v. Hess, 124 U.S. 483, 489 (1888). Were it otherwise, Rule 34 of the Criminal Rules, requiring the arrestation of justice if the indictment does not charge an offense, would be meaningless in jury cases.

As respects the alternate charge of Count I of the indictment, the alleged conspiracy to steal wholly unspecified "timber", the indictment is no better than the averment of a conspiracy to defraud. If "explained" by the first overt act, as appellee urges (B.A. 25), it refers to standing timber, and charges the legally impossible. And, as appellee notes (B.A. 30-31), the word "timber" has an extremely wide variety of meanings. The use of the word "timber", without any specification as to type or location, comes nowhere close to according the "constitutional right to a fair and accurate accusation by indictment." United States v. Seeger, supra at 484.

III. The Motion to Suppress Should Have Been Granted

Although the Fourth Amendment denounces only unreasonable searches, whether a search is reasonable is not determined on an ad hoc basis, as appellee seems to suggest (B.A. 27), but within the framework of established principles. These are summed up in Smith v. United States, 335 F.2d 270, 273 (D.C. Cir. 1964):



"Even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances, such as a significant possibility of removal or destruction of the object of the search."

Here there was a warrantless search, without either arrest or exceptional circumstances. The search was therefore forbidden, i.e., unreasonable as a matter of law, unless the ordinary rules do not apply.

To avoid the usual principles appellee urges the "open field" doctrine, and on this score misconceives appellant's argument. Appellant's argument (A.O.B. 39-40) is not that the "open field" doctrine is non-existent but that on the testimony of the Government's own investigator it has no application here. The undisputed evidence of Investigator Adams is that the search was conducted "immediately adjacent" to the home of appellant Wattenburg - in the trial court's words, in Wattenburg's "backyard". (A.O.B. 12-13). The search was not conducted "in an open field about 250 yards from defendant's house", as in United States v. Hassell, 336 F.2d 684, 685 (6 Cir. 1964), or in a shack "some 500 feet to the rear of the ... residence," as in United States v. Thomas, 216 F. Supp. 942, 944 (N.D. Cal. 1963), or in a cave in a plowed field "approximately 125 yards west or northwest of the house," as in Care v. United States, 231 F.2d

22, 24 (10 Cir. 1956).^{*} The "open field" in this case is merely a turn of phrase of appellee's counsel, contrary to appellee's own evidence.

We note that appellee fails to respond to our submission (A.O.B. 40-41) that it would be a bizarre rule which would entitle the prosecution to search and seize without warrant or arrest in what is claimed to be an "open field", and then obtain a conviction of theft on the theory that stolen property there found is evidence of theft by the occupant of the field because in his "possession".

*

Appellee's other citations are not in point. In Janney v. United States, 206 F.2d 601 (4 Cir. 1953), there was no search at all. A seizure of articles already seen was made pursuant to a valid arrest. In Hester v. United States, 265 U.S. 57 (1924) there was neither search nor seizure; the officers simply picked up abandoned jugs of moonshine. In both Carney v. United States, 163 F.2d 784 (9 Cir. 1947) and Gay v. United States, 8 F.2d 219 (9 Cir. 1925) there were search warrants and valid arrests. The statements in the two last-cited cases that a garage appurtenant to a residence may be searched without a warrant are contrary to Taylor v. United States, 286 U.S. 1 (1932) and Temperani v. United States, 299 Fed. 365 (9 Cir. 1924).

IV. The Evidence Does Not
Support the Verdict on Count I

In its discussion of this subject, appellee makes no effort to show that the evidence supports the charge of conspiracy to defraud the United States, albeit the jury may have convicted appellants on Count I on this theory -- a subject we discuss at pages 17, 20, infra.

The evidence in this case respecting "timber" deals exclusively with very small red fir trees. That large, standing red fir trees may be "timber" is beside the point, for there is no evidence that the trees in this case were anything other than small trees usable only as Christmas trees. The government's own witness referred to what was involved as "Red Fir Christmas trees." (5 R. 892). The authorities are unanimous that such trees are not "timber".
*
(A.O.B. 42-46).

Appellee argues that its failure to prove anything about timber is a mere variance, because appellants "knew that the government was talking about trees, specifically red fir trees," and had moved to suppress the nine trees seized at the Hideaway. (B.A. 32). Of course appellants knew that Count II had to do with red fir trees because theft of such trees was there charged. But if these same trees were the subject matter of Count I, the charge of

*
The only question in United States v. Brown Wood Preserving Company, 275 F.2d 525 (6 Cir. 1960), cited by appellee, was whether turpentine was timber.

Count I is as inexplicable as the Government's carrying off the white fir trees stored at Palmer's Cabin. (See p. 2, supra). If the grand jury intended that Counts I and II refer to the same property, Count I would logically have alleged a conspiracy to steal "Red Fir (silver tip) trees" located in the Plumas National Forest, the subject matter of Count II, not "timber" unspecified as to both type and location. Thus, under the theory of "variance", the Court is asked to affirm a felony conviction on the basis of a guess that what was involved in two quite differently stated counts was in fact the same.

V. The Evidence Does Not Support
the Verdict on Count II

Appellee's review of the evidence (B.A. 33-35) demonstrates, we submit, that the alleged violation of 18 USC §641 lies completely in the realm of speculation. Appellee stresses the point that the charge includes "conversion" of the trees. (B.A. 32). But appellee elsewhere recognizes that conversion is a term which has always been used in connection with interferences with goods or personal chattels. (B.A. 23).

Appellee again suggests that the trees in the instant case "could be" the subject of larceny if they were left to lie before being asported, (B.A. 33), but points to no evidence that this in fact happened. There is no such evidence.

VI. The Instruction Respecting
 "Defrauding the United States"
 Should Not Have Been Given

We have previously shown that the indictment was fatally defective as respects the charge of "defrauding the United States". (Supra, p.10). For this reason alone it was prejudicial error for the trial court to read to the jury this language from the indictment (7 R. 17) and to instruct on the subject (7 R. 19-20) thereby permitting the jury to convict on this theory. Furthermore, there was no evidence to warrant the instruction.

Appellee argues that a conspiracy to defraud the United States "extends to any conspiracy which impairs, obstructs or defeats, the lawful function of any department of the United States" (B.A. 36), citing United States v. Johnson, 383 U.S. 169 (1966) and other cases. None of these cases either so states or holds, and it is apparent from Hammerschmidt v. U.S., 265 U.S. 182 (1924) that this is not the law. In Hammerschmidt, defendants circulated handbills urging persons subject to the Selective Service Act to refuse to obey it. Conduct more likely to impair a lawful function of government can scarcely be imagined, yet this was held not to be a conspiracy to defraud the United States.

In United States v. Johnson, 383 U.S. 169, 172 (1966) and Dennis v. United States, 384 U.S. 855, 861 (1966), cited by appellee, the Court quotes from Haas v. Henkel,

216 U.S. 462, 479 (1910) the language that the statute reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." In appellee's statement of the supposed rule the underscored language has been omitted, doubtless because there is absolutely no evidence that either appellant had any such purpose. The jury could find that Christmas trees were taken by someone from appellee's land, but no one could find that the purpose of the taking was to interfere in any way with any governmental function.*

A reading of the cases cited by appellee, and the cases on which those authorities rely, shows that the crime of conspiracy to defraud the United States requires underhanded conduct engaged in for the purpose of causing a representative of the Government to take some sort of action beneficial to the conspirators and detrimental to the Government's operations. Thus, in Johnson v. United States, 383 U.S. 169 (1966) and Glasser v. United States, 315 U.S. 60 (1942), the defendants approached the Department of Justice for the purpose of obtaining the dismissal of

*

Appellee argues that "it can hardly be doubted that the conspiracy charged in this case impaired, obstructed and defeated the Government in its operation of National Forest land and the proper functioning thereof." (B.A. 37). There is no such evidence; indeed, no such claim was even made below.

indictments, in Johnson by the exertion of influence, and in Glasser by bribery. In Dennis v. United States, 384 U.S. 855 (1966) defendants filed a false non-Communist affidavit in order to obtain the services of the N.L.R.B. Lutwak v. United States, 344 U.S. 604 (1953) and United States v. Vasquez, 319 F.2d 381 (3 Cir. 1963) both involve representing "phony" marriages with aliens as genuine for the purpose of gaining admission to the United States. Haas v. Henkel, 216 U.S. 462 (1910) involves the bribery of a Government official to obtain the revelation of confidential information of the Department of Agriculture. In Harney v. United States, 306 F.2d 523 (1 Cir. 1962) defendants fraudulently prevented an honest appraisal of land to be taken for a federal aid highway for the purpose of causing the Government to pay more than true value. And United States v. Furer, 47 F. Supp. 402 (S.D. Cal. 1942) involved bribery of Government agents to obtain Government contracts.

None of these cases is remotely similar to the instant case. Nothing was done in this case for the purpose of causing any representative of the Government to do anything or for the purpose of impairing Government functions in any way. As elsewhere in its brief, appellee seeks to have this Court create a new crime - here, an omnibus offense which, if it existed, would swallow up and make surplusage of all other conspiratorial crimes in any way affecting

Government property.

Appellee urges that it was not required to prove that appellants conspired both to defraud the United States and to commit an offense against the United States, and that accordingly a failure of proof of conspiracy to defraud would not be reversible error. (B.A. 29). Assuming the validity of the premise, the conclusion is unsound. The rule of Turf Center, Inc. v. United States, 325 F.2d 793 (9 Cir. 1964) and Arellanes v. United States, 302 F.2d 603 (9 Cir. 1962) would presumably preclude a directed verdict on Count I although one branch of a conjunctive charge found no support in the evidence, but nothing in this rule permits instructing the jury on the law applicable to an unproved charge. On the contrary, even when the evidence is sufficient to support a conviction, it is reversible error to give an instruction on a state of facts which has no support in the evidence. Morris v. United States, 326 F.2d 192 (9 Cir. 1963).

Appellee equates its duty of proof with its right to instructions. The vice of this equation is that the jury could have found that there was no conspiracy to steal timber, but yet have convicted on Count I upon the notion, unsupported in the evidence, that appellants conspired to defraud the United States.

VII. The Prior Indictment Should
Have Been Admitted In Evidence

Appellee first argues that there is no authority to support the admissibility of "a superseded indictment." (B.A. 37-38). But it is elementary that the pleadings of a party filed in a prior action which tend to disprove any material fact in a subsequent action are admissible, and this is true whether or not the pleading offered in evidence was superseded. ^{*} Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304, 310 (6 Cir. 1958); State Farm Mutual Ins. Co. v. Porter, 186 F.2d 834, 840 (9 Cir. 1951). In proceedings to which the United States is a party, this rule applies to an indictment which is, of course, a pleading by the United States prepared by its officers authorized to prepare such documents. United States v. Continental-American Bank & Trust Co., 79 F. Supp. 450, 453 (W.D. La. 1948).

Appellee finds it "noteworthy" that co-defendant Owens objected to the introduction of the prior indictment (B.A. 38), but fails even to suggest the relevance of this fact. We perceive none. Appellant Wattenburg was tried

* We therefore do not pause to consider whether or how the indictment in this proceeding "superseded" the indictment returned earlier as the result of a separate grand jury proceeding.

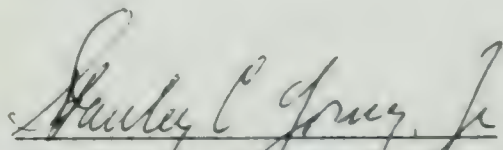
with Owens because appellee chose to have it so, and a defendant is certainly not deprived of his right to introduce evidence relevant to his defense because as to a co-defendant the evidence is irrelevant.


Finally, appellee argues that the trial court had discretion to admit or reject evidence. (B.A. 38). But it is also the rule that where proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility. Holt v. United States, 342 F.2d 163, 166 (5 Cir. 1965). This was a close case, built entirely on circumstantial evidence. The proffered indictment was strong evidence from the hand of appellee itself that appellant Wattenburg was not a party to the alleged crime of Owens, and the trial court's refusal to permit the jury to consider it cannot, we submit, be considered the proper exercise of judicial discretion.

CONCLUSION

We respectfully submit that the judgment of conviction of appellant Wattenburg should be reversed, with directions to dismiss the Indictment.

Dated: July 10, 1967.

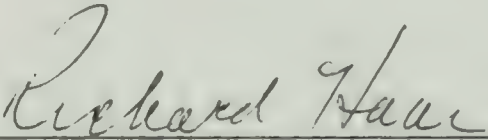

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Richard Haas

Attorneys for appellant
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Richard Haas

No. 21,302 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAHALA ASHLEY DICKERSON,)
)
Appellant,)
)
vs.)
)
RICHARD GANTZ, JAMES DELANEY,)
JR., GEORGE HAYES, ROBERT)
ERWIN, and DAVID THORSNESS,)
)
Appellees.)
)

BRIEF OF APPELLEES

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FILED

MAY 18 1967

WM. B. LUCK, CLERK

MAY 17 1967

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JURISDICTIONAL STATEMENT

Rule 18(a) of this Court requires a statement of the "pleadings and facts" disclosing the basis contended for District Court jurisdiction and that "this court" has jurisdiction to review.

Final judgment was entered below dismissing plaintiff's second amended complaint (R 284) and § 1291, Title 28, USCA sustains the jurisdiction of this court to review that judgment.

Except as to the third claim for relief of the second amended complaint based on violation of the antitrust laws, Appellees can find no "pleadings or facts" sustaining the jurisdiction of the District Court to render its judgment. In fact the District Court didn't either and dismissed.

Absence of jurisdictional prerequisites will be developed throughout this brief.

STATEMENT OF THE CASE

The rules of this court require Appellees brief to contain a statement of the case unless that of Appellant be not controverted.

Appellant's statement of the case (Appellant's brief pp. 9-13) is hard to "controvert". Even if generally true, which is denied, little if any bears on the merits of this appeal. She alleges the filing of an action against the Alaska Bar Association and its dismissal by Judge Hodge over her objection (R 169). The record (R 158-159) discloses that it was dismissed by stipulation bearing the signature of Appellant.

She asserts that a certificate of good standing was denied her by the Alaska Supreme Court because of a grievance pending against her.(R 179). She seems to imply that the certificate was withheld solely because the Grievance Committee had advised the Alaska Supreme Court of a lodging of the grievance against her. But she herself called the Supreme Court's attention to the grievance by "Petition for Original Relief" (R 8-23 & 165) filed in April 1964.

She fails to point out that the rules governing the Alaska Bar Association promulgated by the Supreme Court effective June 1, 1964, contain Rule 9, Section 5 of which (App.p.1, this brief) require copies of all

written complaints of misconduct "to be mailed to the Clerk of the [Alaska] Supreme Court". The grievance involved here (R 71,72) was such a "complaint of misconduct" and the Grievance Committee having it before them on June 1, 1964, when the Supreme Court rules became effective was required by said rules to mail a copy to the Clerk of the Supreme Court. The Clerk in turn on July 29, 1964, advised Appellant that her request for Certificate of Good Standing was denied (R 83). On whose authority she took such action the record does not reflect. It could hardly be contended that she acted at the instance of the Appellees. Her superiors, the Supreme Court Justices were not made parties. Incidentally, it appears that someone connected with the Supreme Court, whether Justices or Clerk, changed their minds, since a Certificate of Good Standing was issued on August 31, 1965, and is still in force. (App. pp. 11-v, this brief) Nor is any grievance pending against her.

The case as pleaded by Appellant is for four separate claims for relief. First, injunction against further action to harass and intimidate; Second, conspiring to harass and intimidate; Third, violation of antitrust laws; and Fourth, libel.

Diversity being absent, jurisdiction fails except as to violation of the antitrust laws. However the long and repetitive second amended complaint was



civil rights overtones and as Judge Plummer pointed out in his Memorandum of Decision and Order (R 280) Appellant contended on argument that her claim was really for deprivation of her constitutional and civil rights.

Conceding this to be true, the case is for violation of the antitrust laws and of the civil rights act. All other features are outside the federal jurisdiction.

But the court below found that no claim was or could be stated for violation of the antitrust laws (R 265) and that by reason of failure to comply with Rule 8(c) (1) Rules of Civil Procedure no claim had been stated under the Civil Rights Act (R 264,265). Appellant was allowed thirty days to amend (R 265). She did not do so and the remaining count was dismissed (R 283).

Laying aside claims outside the federal jurisdiction, this appeal then is to review the dismissal of the antitrust count for failure to state a claim for relief and to review the action of the trial court in dismissing the civil rights claim following Appellant's refusal to amend.

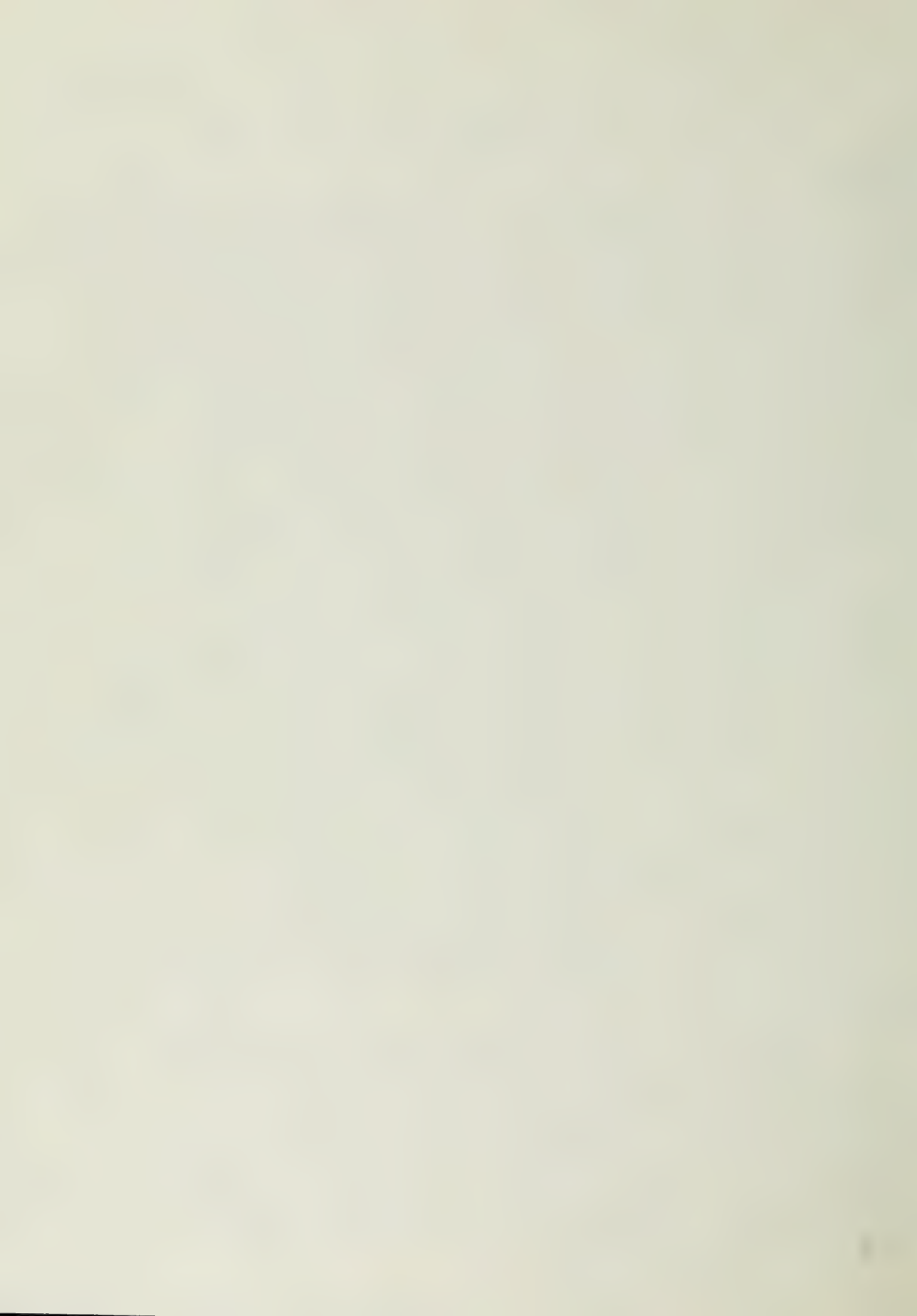


ARGUMENT

Attorneys

At the threshold of her case, Appellant is confronted with the admitted fact that the Appellees are attorneys at law and members of the Alaska Bar Association, which, as Appellant points out in Paragraph 4 of her Second Amended Complaint (R 164) is an instrumentality of the State of Alaska created by the Legislature and recognized by the State Constitution. It is apparent from the record and was conceded by Appellant below (R 231) that all of the acts complained of with one exception were performed by Appellees in their several capacities as members of a grievance committee appointed by the Alaska Bar Association to process grievances which might be lodged against members of the Bar, and who, as Appellees alleges, were acting under color of State law. The exception is Appellee, Robert Erwin "Complainant, the District Attorney" R 187 who, in his capacity as State District Attorney, so it is alleged, lodged a complaint with the grievance committee respecting Appellant.

Appellant seeks to overthrow the long standing rule that disciplinary proceedings against an attorney are quasi-judicial in character and that absolute immunity attaches to statements and actions of those participating therein, whether as complainants, witnesses or grievance



committee members. Special immunity surrounds the official acts of district attorneys. This is the holding of a solid line of authorities, ancient and modern, in both England and the United States and in the Federal Courts as well as the State Courts.

The immunity which surrounds Appellees disposes of the case at the outset. They cannot be held to answer for their actions whether the suit be for violation of the antitrust laws, or the Civil Rights Act.

Immunity

The best modern analysis of the authorities dealing with the subject of absolute immunity surrounding the statements and actions incidental to a judicial proceeding or quasi-judicial proceeding, such as a disciplinary action, is found in the decision of the Supreme Court of Oregon in Ramstead v. Morgan, (Ore. 1959) 347 P.2d 994. Dozens of cases, both State and Federal, including the early American and English decisions, are cited and analyzed. The conclusion of the Oregon court was that absolute immunity attached to a complaint made to the chairman of a county grievance committee of the Oregon Bar and, by analogy, extended to the committee receiving the complaint and their action on it. The opinion of this court in Parker v. Title and Trust Company, 233 F. 2d 505 (reh. den. 317 F. 2d 423) was cited in support as was 3 Restatements, Torts, § 587. Attention was called to the decision



of the California Supreme Court in Albertson v. Halperin,
(Cal. 1956) 295 P.2d 409, recognizing the privilege in
connection with judicial proceedings where no function
of the court or its officers was involved, such as in
the filing of a Lis Pendens.

Civil Rights Cases

Nor is the rule different in civil rights cases.
The immunity which surrounds the Appellees here is not
destroyed by interposition of the Civil Rights Act. This
is the plain holding of this court in several recent cases.
In 1965 it was said in Haldane v. Chagnon, (9th Cir.)
345 F.2d 601, 603, that -

"The time honored rule of judicial
immunity***so firmly and deeply planted
in the field of Anglo-American law
is operative in actions grounded upon
the Civil Rights Acts."

In Agnew v. Moody, (9th Cir. 1964), 330 F. 2d 406, 409,
this court rejected the argument that a charge of conspiracy
took the case outside the rule of immunity in civil rights
cases and said -

"And although conspiracy is an essen-
tial element of the offense under 42
USCA, Section 1985 [Civil Rights Act],
the doctrine of immunity nevertheless
applies to actions under that section."

Nor has Monroe v. Pape, (1961) 365 U.S. 167, 81 S. Ct. 474,
5 L.Ed. 2d 492, made the doctrine of immunity inapplicable
to the civil rights cases. It treats with an entirely

different matter and will be dealt with later in this brief. The Ninth Circuit Court decisions above mentioned were rendered after Monroe, supra, and this court saw no such result. The Eighth Circuit specifically discussed the application of Monroe in Rhodes v. Van Steennburg, et al, (8th Cir. 1964), 334 F.2d 709, 718, and after surveying the cases citing Monroe, said -

"We find there is overwhelming support for the position that judicial immunity and its derivative quasi-judicial immunity have not been affected by Monroe. See Harvey v. Sadler, (9th Cir.) 331 F.2d 387."(Citing other cases)

Practice of Law

But this is not all. The right to practice law in the state courts is not a privilege granted by the Constitution or laws of the United States, and alleged interference with that right raises no federal question; and the alleged conspiracy to deprive Appellant of her right to practice law is not a conspiracy to interfere with any right or privilege "granted, secured or protected by the Constitution of the United States". This is the holding of this court and of federal courts everywhere.

In an offshoot of this very case, the Alaska District Court held and decided in Alaska Bar Association v. Dickerson, 240 F. Supp. 732, that the right to practice

law in the state court is not a privilege granted by the federal constitution or laws, citing Mitchell v. Greenough, (9th Cir. 1938) 100 F. 2d 184 (cert. den. 306 U.S. 659) and Niklaus v. Simmons, (D.C. Neb. 1961) 196 F. Supp. 691, and Green v. Elbert, (8th Cir.), 63 F. 308, holding that a conspiracy to deprive a lawyer of his right to practice law in the state courts, was not a conspiracy to interfere with any right or privilege granted, secured or protected by the Constitution of the United States, was also cited.

Mitchell v. Greenough, supra, and the Supreme Court authority on which it is based, was cited by Circuit Judge Lemon in his dissenting opinion in In Re Sawyer, (9th Cir. 1956) 256 F.2d 553. The standing of Mitchell v. Greenough, supra, as the law of this circuit was not challenged in the majority opinion.

Due Process

This is not to say that plaintiff, as a member of the Alaska Bar, is not entitled to the benefit of the Due Process Clause of the 14th Amendment in connection with grievance or disciplinary proceeding lodged against her pursuant to state law or regulation. Application of due process to the record before the court in this case is later developed.

The Separate Causes of Action

Considered against this background, we will discuss the four claims in the order of their appearance. The deficiencies above pointed out are applicable to all claims and will not be restated.

First Claim is Moot. (Injunction against further action to harass and intimidate.

The allegation is that Appellant was the subject of a false and groundless grievance complaint (R 164) based on an invalid rule, (R 166) and that during the processing of the complaint, she was denied due process and equal protection of the laws. But the Appellant also alleges that on October 12, 1965, the Bar Association dismissed the grievance complaint (R 167) and promised to give Appellant equal protection of the laws (R 169). Further, by stipulation between Appellant and the Alaska Bar Association in this case, it was agreed that any grievance against Appellant, either pending or future, would not be entertained under the then revoked Supreme Court Order No. 64, of which she complains (R 157); or by a grievance committee of which Appellees were members (R 158).

It is clear that no present controversy, justifiable or otherwise, between Appellant and Appellees exists by reason of the first claim. The Supreme Court in

United States v. Alaska Steamship Company, (1919) 254 U. S.

133, 116, 40 S. Ct. 396, 64 L. Ed. 808, said -

"***it is a settled principle in this Court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where, by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. ***This court is not empowered to decide moot questions or abstract propositions, or to decide for the government of future cases, principles or rules of law which cannot affect the result as to the matters in issue in the case before it."

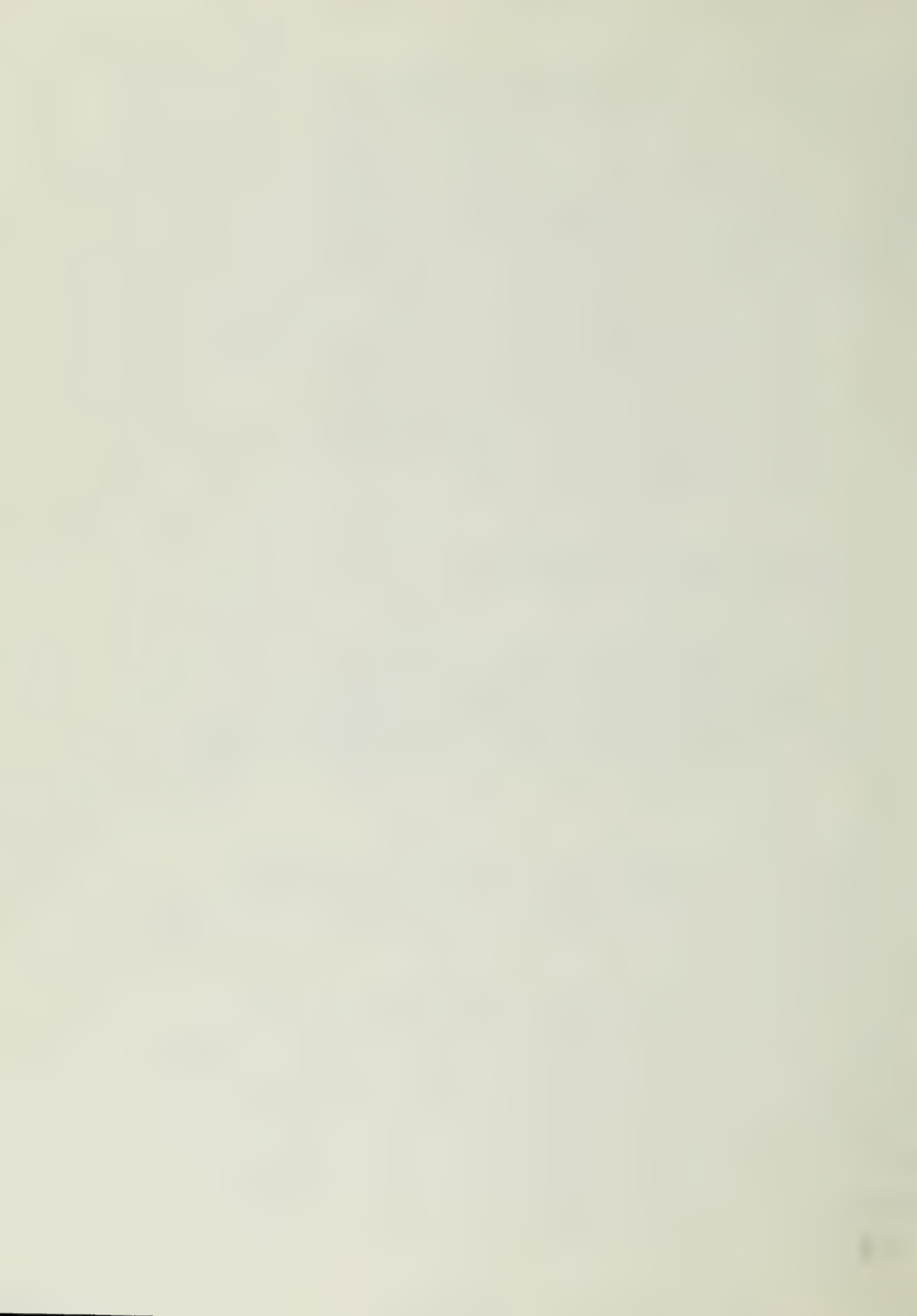
See also the decision of this Court in Sawyer v. Pioneer Mill Co., (9th Cir. 1962) 300 F.2d 200.

"Claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention."
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 455, 80 L.Ed. 688; State of Arizona v. State of California, 283 U.S. 423, 452, 51 S.Ct. 522, 75 L.Ed. 1154.

Byer v. Securities and Exchange Commission,

(8th Cir. 1958) 251 F.2d 512, and authorities there cited are to the same effect.

Since the stipulation and order of October 11, 1962 (R 158), no grievance complaint has been pending against Appellant and the controversy has been moot. There is nothing for the court to act upon. By that stipulation the Bar Association agreed not to reinstate



any grievance against the Appellant under the Supreme Court Rules or to refer any future grievance to a grievance committee composed of these Appellees.

Second Claim. (Damages for conspiracy to harass and intimidate (R 177)).

The allegation set forth in Paragraph 2 of the Second Claim is that the Appellees and others "conspired to harass and intimidate Appellant, deny her due process of law, equal protection of the laws, and deny her the right to pursue her profession" (R 178).

It is obvious that the alleged conspiracies, if any, (1) to harass and intimidate, and (2) to deny her the right to pursue her profession, do not involve any Federal question since they do not invade rights secured or protected by the Federal Constitution or laws.

This leave only the alleged conspiracies to deny Appellant (1) due process of law, and (2) equal protection of the laws. These will be discussed later.

Third Claim (Violation of antitrust law (R 181)).

The allegation here is that Appellees in a manner not disclosed conspired to deny Appellant the right to practice law throughout the United States and did thereby "restrain commerce between the States and place unlawful restraint on competition". (R 182) The specific section of the antitrust laws violated is not

set forth. It is apparent, however, that Appellant attempts to allege violation of Section 1 of the Sherman Act (Title 15, § 1, USCA). There is no suggestion of monopolization or attempt to monopolize in violation of Section 2 of the Sherman Act (Title 15, § 2, USCA) or of price discrimination, exclusive dealing, etc., such as it denounced by the Clayton Act as amended by the Robinson-Patman Act (Title 15, § 13, USCA). Laying aside the fact that the practice of law, even by those who practice in more than one state, is not engaging in interstate commerce, Appellant is still confronted with the fact that restraint of commerce is not a violation of the antitrust law unless the restraint is so unreasonable as to unduly restrict the free flow of interstate commerce. There is no such claim here. See Klor's, Inc. v. Broadway Hale Stores, (9th Cir. 1958), 255 F.2d 214, where on page 226 this court reverted to its earlier decision that a complaint to state an action under Section 1 of the Sherman Act must allege facts showing -

"that the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

The Supreme Court reversed Klor's Inc. on other grounds, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, but said on page 211 of the decision that the Sherman Act proscribed contracts or acts [conspiracies] which had a monopolistic tendency

"and which interfered with the natural flow of an appreciable amount of interstate commerce." This is another way of saying the same thing.

This court in Klor's Inc., supra, said on page 224 -

"Apex Hosiery Co. v. Leader, [310 U.S. 469] teaches that not every restriction on commerce is a restraint of trade within the meaning of the sherman Act."

Practice of Law

But the practice of law is not commerce within the meaning of the antitrust laws. This was pointed out by Chief Justice Stone in his dissenting opinion in the United States v. Southeastern Underwriters Association, (1944), 322 U.S. 533, 573, 64 S. Ct. 1162, 88 L.Ed. 1440. The case dealt with the insurance business and Justice Stone, in the course of his opinion, said on page 573 of 332 U.S. -

"The practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees. Federal Baseball Club v. National League, supra."

In the authority cited, Federal Baseball Club v. National League, (1922) 259 U.S. 200, 201, 42 S.Ct. 465, 66 L. Ed. 898, Justice Holmes had said -

"To repeat the illustration given by the court below, a firm of lawyers sending out a member to argue a case ***does not engage in such commerce [interstate commerce] because the Lawyer***goes to another state."

The reference to the court below was to the decision of the District Court of Appeals of the District of Columbia in National League, etc. v. Federal Baseball Club, 110 F. 681, 685, where the court said -

"Suppose a law firm in the City of Washington sends its members to points in different states to try lawsuits; they would travel, and probably carry briefs and records in interstate commerce. Could it be correctly said that the firm, in the trial of the lawsuits, was engaged in trade or commerce?"

Fourth Claim (Libel (R 183)).

The libel action fails on all grounds. The actions and utterances were cloaked with immunity and did not involve a right or privilege secured by the Federal Constitution. There is no diversity and no special statutory jurisdiction. We need give no further consideration to the libel claim.

Civil Rights

The principal effort of plaintiff no doubt is to state a cause of action under the Civil Rights Act. What is the Civil Rights Act?

§ 1983 and 1985

The application here is limited to § 1983 and 1985

of Title 42 USCA, § 1983 creates a liability against -

"Every person who under color of statute, ordinance, regulation*** of any state***subjects***any citizen***to deprivation of any rights, privileges or immunities secured by the Constituion and laws [federal laws].

Laying aside equal protection of the laws and equal privileges and immunities under the laws it is immediately apparent that under the facts alleged only due process is left for consideration.

Due Process

"Nor shall any state deprive any person of life, liberty or property without due process of law." (14th Am.)

No Denial of Due Process

As affirmately appears from the allegations of the complaint, Appellant has not been deprived of "life, liberty or property". She still has her life and liberty. She has never been detained. The only property involved, if it is property, is her right to practice law in the State Court of Alaska. This she still has. Furthermore, all proceedings to deprive her of that right have been dismissed, and the matter is moot.

But even so, what are the actions of Appellees alleged to have constituted denial of due process.

(The Following references are to numbered paragraphs of Appellant's Second Amended Complaint.)

Paragraph Five (First Claim) (R 165)

Appellant was served with a complaint based on a charge commenced against her before a grievance committee of the Alaska Bar Association "chaired" by Appellee Delaney and initiated by Appellee Erwin. The complaint was void. She was denied the "right" by the grievance committee "chaired" by Appellee Delaney to cross-examine witnesses against her and to "challenge for cause". It appears from Sections 8 and 9 that Appellant was never brought to trial, and therefore the denial of the right to cross-examine obviously occurred before trial. There was no trial. The complaint was dismissed (R 158). The reference to "the challenge for cause" is not further elaborated.

Paragraph Five (Second Claim) (R 180)

The grievance committee of which Appellee Delaney was chairman requested plaintiff to "make full disclosure", and she was asked to appear as a witness against herself. which she did not do. Nor was she disciplined for her refusal; or disciplined at all.

The foregoing are the only actions attributable to Appellees, or any of them, which in any sense approach

the field of due process.

The filing of the charge with the grievance committee and the action of the grievance committee in issuing a complaint on it are hardly to be deemed the taking of property without due process of law when no trial was held and the complaint was dismissed. Nor was due process violated by refusal to allow Appellant to cross-examine the witnesses against her prior to trial. The matter was in an investigatory stage, and since the occurrence was before June 1, 1964, the effective date of abortive Supreme Court Rule 64, the Committee was governed by Rule 130 of the Rules of the Board of Governors (Appellants brief App. p. 58) requiring that the accused be notified in writing that she "may" appear to give any explanation or such evidence as she "deems necessary". There is no allegation that she attempted to contact the witnesses directly and was prevented from so doing by any of the defendants or that she endeavored to exercise any right of discovery which she may have had. There never was a trial. The charges were dismissed.

State Law

Even if, as Appellant contends, the acts complained of constituted a departure from procedures established by state law or regulation and, if proven, would constitute a violation of Appellant's right under state law, still

they involve no federal question or violation of federal law and are not made so by mere conclusory allegations that Appellant was denied due process or equal protection of the laws in violation of the federal constitution. This is so because the allegations of the complaint, when considered apart from the conclusory statements, do not show denial of due process or equal protection of the laws.

"It is elementary that errors, if any, involving only state law do not deny due process." Baxter v. Rhay, (9th Cir. 1959) 268 F. 2d 40, 43, Citing Gryger v. Burke, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683.

In Draper v. Rhay, (9th Cir. 1963), 315 F. 2d 193, 198, this court said -

"Due process questions do not arise merely because appellant has been treated at variance with state law." Citing Hughes v. Heinze, (9th Cir.) 268 F. 2d 864, 869, where the court said -

"However this variance [with state law] without more, is not a federal question." (citing more 9th circuit decisions)

As this court pointed out in Agnew v. City of Compton, (9th Cir. 1956), 239 F. 2d 226 -

"General allegations of this kind, [constitutional violations] when unsupported by the complaint, read as a whole, have consistently been rejected as insufficient."

The Eighth Circuit said in Stanturf v. Sipes, (8th Cir. 1964), 335 F.2d 224, 229 -

"A mere assertion of a deprivation of a Federal constitutional right is not sufficient to sustain Federal jurisdiction; conclusory statements unsupported by adequate factual allegations in the complaint will not suffice." (Citing cases including Swank v. Patterson, (9th Cir.) 139 F.2d 145, 146.)

In Yglesia v. Gulf Stream Park, etc., (5th Cir. 1953) 201 F.2d 817, 818, it was said on the authority of Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939, that where the alleged claim under the Constitution or Federal statutes clearly appears to be alleged or made solely for the purpose of creating federal jurisdiction over what would otherwise be an action to vindicate a right arising only under State law and no substantial facts establishing federal jurisdiction are alleged, mere conclusions asserting the violation of a Constitutional right are insufficient.

§ 1985 - Equal Protection

The remaining civil rights provision is § 1985 Title 42, USCA, creating liability -

"If two or more persons conspire *** for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws."

But the complaint is equally devoid of allegations showing deprivation of equal protection, privileges and immunities as in the case of due process and what was said before on that score is equally applicable here.

Also it should be noted that the violation is to deny "equal protection" or "equal privileges and immunities". It is not enough under § 1985 to simply deny protection of the laws or of privileges and immunities. It is an anti-discrimination statute. Lack of equal treatment or discrimination is an essential element of an action founded upon it, and the requirement is not changed by Monroe v. Pape, *infra*, and Cohen v. Norris, *infra*.

No Discrimination

In Snowden v. Hughes, (1943) 321 U.S. 1,8; 64 S. Ct. 397; 88 L.Ed. 497, the Supreme Court, in speaking of the elements of intentional and purposeful discrimination necessary to sustain an action under § 1985, supra, said -

"But discriminatory purpose it not presumed, Tarrance v. Florida, 188 U.S. 519, 520, 23 S.Ct. 402, 47 L.Ed. 572; there must be a showing of 'clear and intentional discrimination'; Gundling v. Chicago, 177 U.S. 183, 186, 20 S.Ct. 633, 44 L.Ed. 725 (citing additional cases). Thus the denial of equal protection by the exclusion of Negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face (citing cases), but a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race (citing cases.)"

Truitt v. State of Illinois, (7th Cir. 1960) 278 F. 2d 819 is to the same effect. The Seventh Circuit pointed out that the Section 1985 does not create

a cause of action for false imprisonment unless such imprisonment -

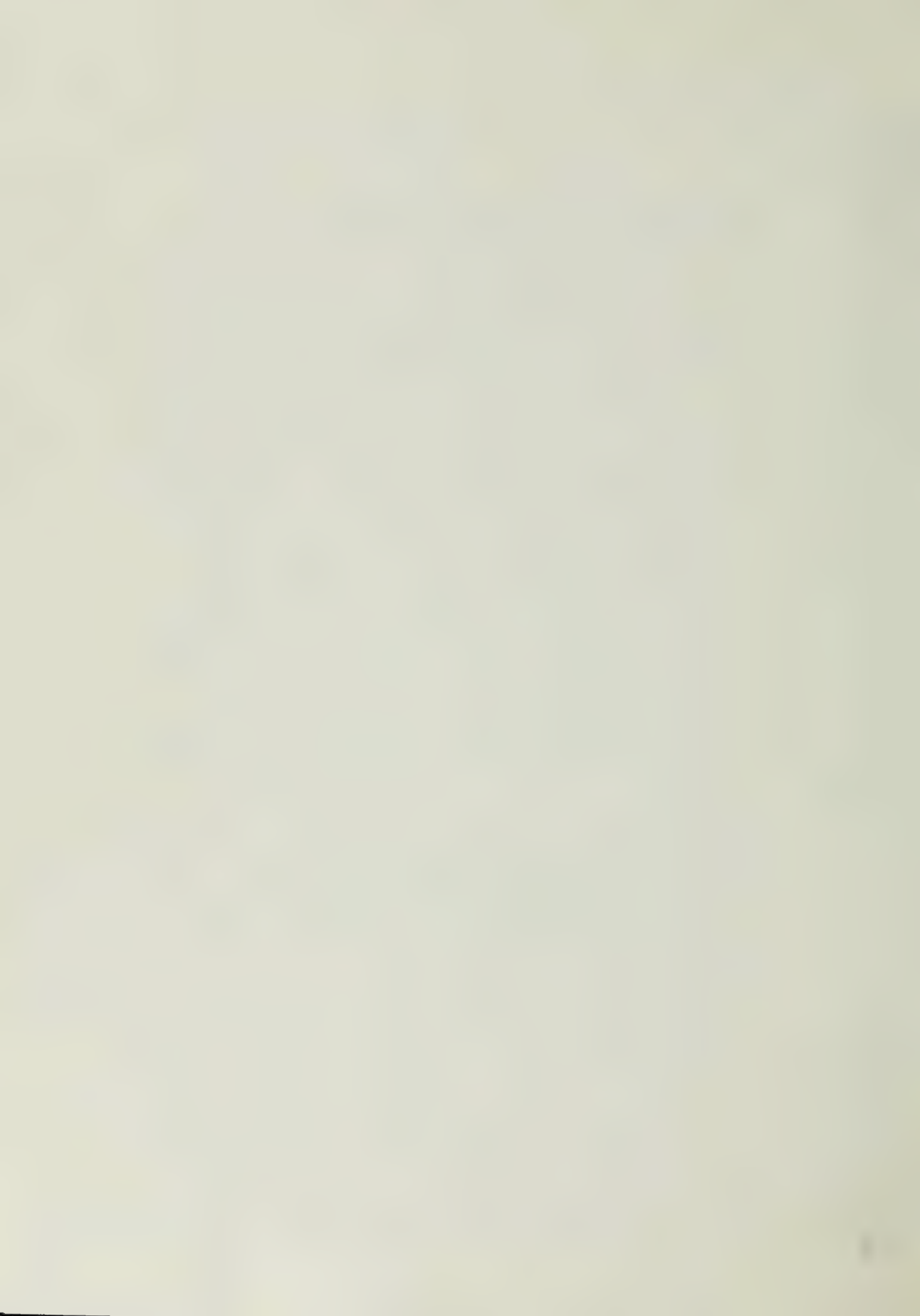
"is in pursuance of a systematic policy of discrimination against a class or group of persons."

Appellant's complaint fails to meet the test.

While she has made the conclusory statement that she was denied equal protection of the law, the facts alleged are only that she was charged under State Bar rules which she claimed were invalid and that her rights were invaded during the investigation. She does allege that she was the only one so charged. But there is no suggestion that others should have been similarly charged or that, if they had been so charged, their rights would not have been invaded to the same extent she claims occurred in her own case. As the Supreme Court pointed out in Snowden v. Hughes, *supra* -

There must be a showing of clear and intentional discrimination; a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

Appellant seeks to avoid application of the rule by alleging that she is the only member of the Alaska Bar of the Negro race (R. 170). The implication is that any charge against her must therefore be discriminatory. The end result of such a contention is that, by virtue of a statute creating liability for denial of her constitutional



rights, she is rendered immune from disciplinary action, regardless of her conduct, as long as she is the sole Negro member of the Alaska Bar Association. The position is untenable.

Both § 1983 & 1985

What has heretofore been said, concerning both sections of the Civil Rights Act must be weighed in the light of the decision of this court in Cohn v. Norris, (9th Cir. 1962) 300 F. 2d 24, wherein the court drew a sharp distinction between the allegations necessary to sustain an action based on § 1983 on the one hand and such allegations based on § 1985 on the other hand. Prior to Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 492, this court had used language in Agnew v. City of Compton, 329 F. 2d 226, Hoffman v. Haldane, 260 F. 280, and Walker v. Bank of America, 268 F. 2d 16, holding or implying that an allegation that the purpose of the defendant in committing the acts complained of was to discriminate between persons or classes of persons was essential to a cause of action on either § 1983 or 1985.

But in Cohen v. Norris, *supra*, the court confined the rule requiring allegation of a purpose to discriminate to actions based on § 1985 which in terms makes deprivation of equal protection, or equal privileges and immunities

an essential element of the action. The court said on page 27 -

"It is likewise true that an essential ingredient of a claim under Sec. 1985 (3) is that a defendant have a purpose of depriving another of the equal protection of the laws or of equal privileges and immunities under the laws."

On page 29, the court held that allegations of such "purpose" was not "essential to the statement of a claim under § 1983" and found it necessary on the basis of Monroe v. Pape, supra, to overrule implications to the contrary in the earlier decisions.

But this does not affect the rule layed down by the Supreme Court in Snowden v. Hughes, supra, and followed by this court in Agnew v. City of Compton, supra, and Hoffman v. Haldane, supra, and reiterated in Cohen v. Norris, supra, making allegations of "purpose", "an essential ingredient" of claims under § 1985 (3).

The inevitable conclusion then is that the allegations will not sustain an action on either Section. They are generally defective as to both statutes and additionally so as to § 1985.

Rules of Pleading

The trial court properly found Appellant's complaint to be completely lacking in conformity with Rule 8, Rules of Civil Procedure requiring it to contain



(1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, and (2) a short and plain statement of the claim showing that the pleader is entitled to relief.

These deficiencies are not as to form, but as to substance. Failure to comply with the rules compounds the efforts required to deduce the nature of the claims sought to be pleaded.

Appellant was given an opportunity to amend (R 265) but refused (R 283). Fundamental to affirmance is a finding that the trial court abused its discretion in directing the amendment and dismissing for failure to amend. As pointed out by this court in Agnew v. Moody, supra, p. 871, "Appellant left the court no choice". That case and the authorities there cited fully sustain the action taken.

The Case is Entirely Moot

Included in the appendix of this brief (App. pp. iii-vi) are reproductions of official records and certifications of the Alaska State Supreme Court and the Alaska Bar Association showing that as of this date Appellant holds a Certificate of Good Standing from the Supreme Court of Alaska and that no grievance is pending against her before the Alaska Bar Association or any grievance committee thereof. Appellees request this court to take judicial notice of these documents. They show that Appellant has and enjoys

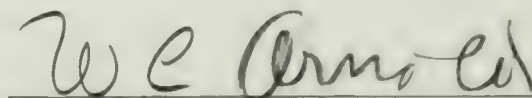
every right which she claims to have been deprived of. There is no relief which this court or the trial court could afford her. The case is entirely moot.

Conclusion

No claim for relief is stated. No federal jurisdiction is shown. Appellant failed to amend as directed. The case is moot. The judgment should be affirmed.

DATED: May 8, 1967.

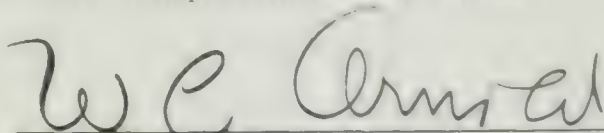
Respectfully submitted,



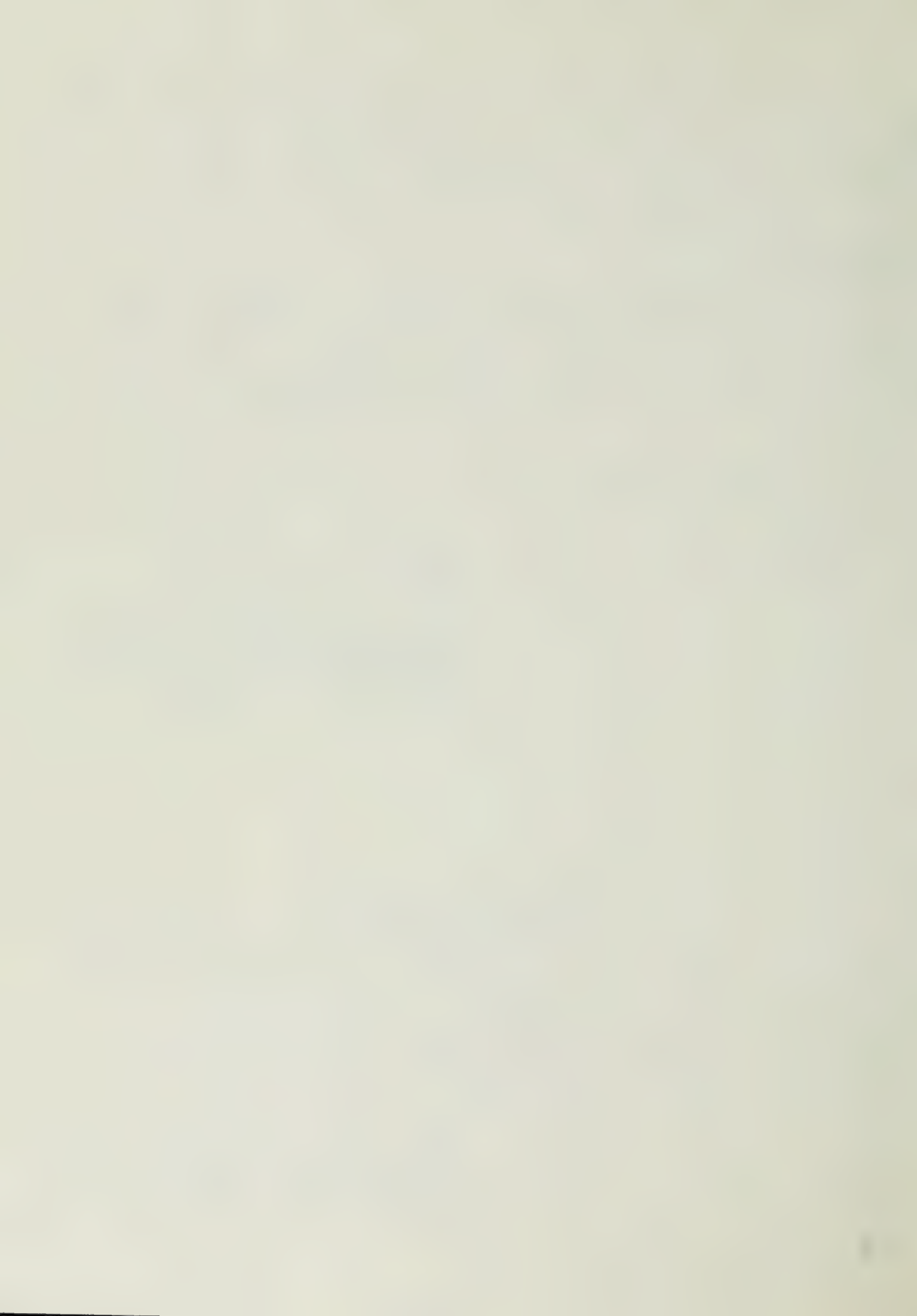
W. C. ARNOLD
Attorney for Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 30 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.



W. C. ARNOLD
Attorney for Appellees



APPENDIX

RULES OF THE ALASKA BAR ASSOCIATION

RULE 1

ORGANIZATION OF THE ALASKA BAR ASSOCIATION

Section 1. Creation of Association. All persons admitted to the practice of law in the State of Alaska are hereby organized as an association to be known as the Alaska Bar Association and shall be subject to the rules hereinafter set forth. These rules are adopted in the exercise of the Supreme Court's inherent authority over members of the legal profession as officers of the Court and shall be called the Alaska Bar Rules.

RULE 9

GRIEVANCE COMMITTEES, PROCEDURES AND REINSTATEMENT

Section 5. [Rule 9] Initial Complaint Procedures. All complaints of misconduct shall be in writing, and if practicable signed by the person complaining. The complainant shall make a brief statement of the details of each act of alleged misconduct and the approximate time and place thereof. Within three days after receipt by the committee, or any member thereof, the chairman shall serve copies on the respondent in accordance with section 20 of this rule. Copies shall, within the same time, be mailed to the President and the Clerk of the Supreme

Court. [Emphasis supplied] It shall be the duty of the respondent within ten days after service to make a full and fair disclosure in writing of all the material facts and circumstances pertaining to his conduct in relation to matters set forth in the statement. The deliberate failure to make disclosure or any knowing misrepresentation or concealment of any facts and circumstances by the respondent shall be grounds for discipline. The respondent shall serve and mail copies of his disclosure in the same manner as provided for the service of the statement by the grievance committee and shall serve the chairman of such committee.

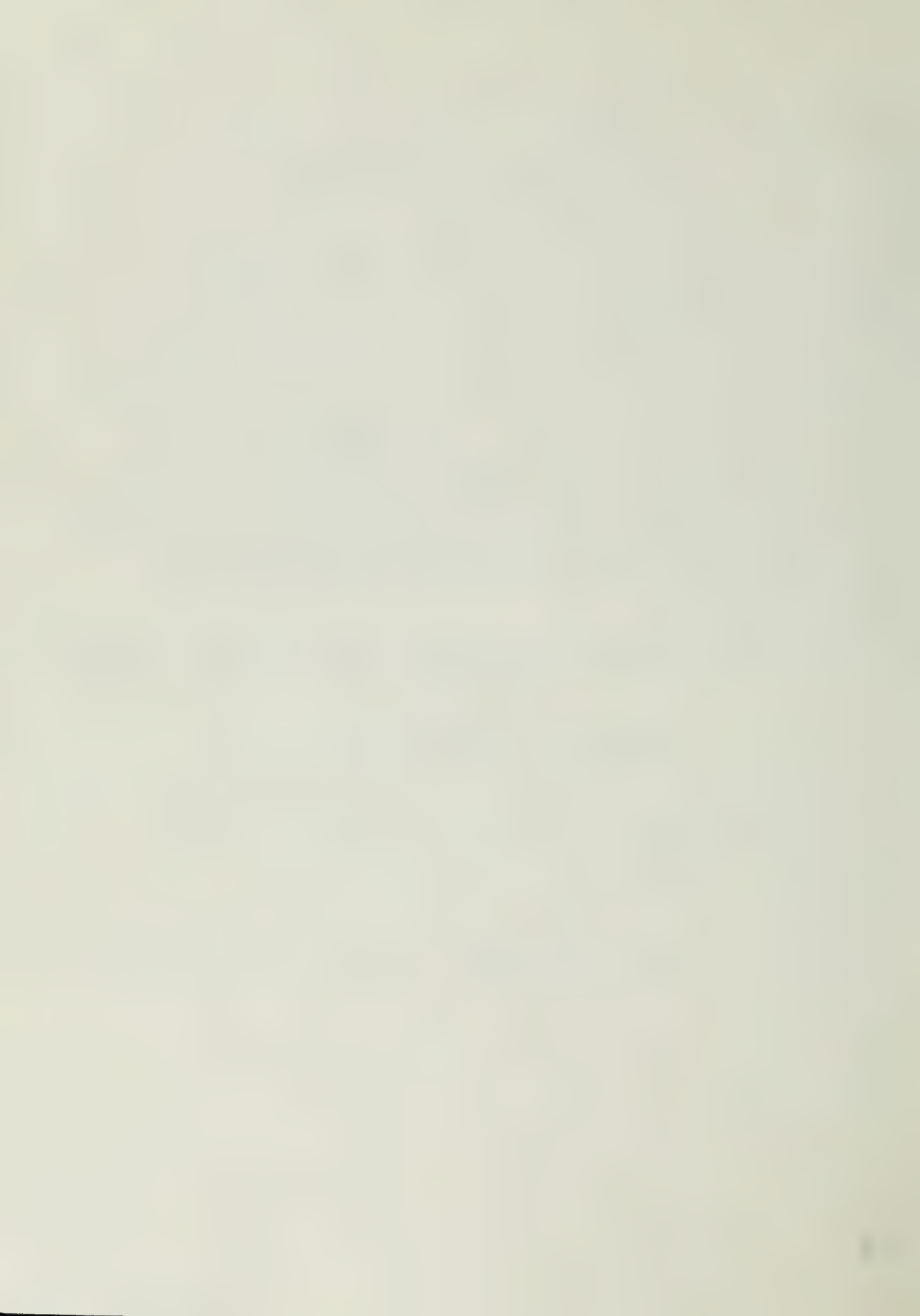
[Emphasis supplied]

RULE 13

EFFECTIVE DATE OF RULES

The Rules of the Alaska Bar Association shall take effect on June 1, 1964.

[As promulgated by the Alaska Supreme Court]



THE SUPREME COURT OF THE STATE OF ALASKA

CERTIFICATE

I, Josephine M. McPhetres, Clerk of the Supreme Court of the State of Alaska, do hereby certify that so far as the records of this court indicate, M. Ashley Dickerson is presently in good standing in this court.

JOSEPHINE M. MCPHETRES
CLERK, SUPREME COURT,
STATE OF ALASKA

THE SUPREME COURT OF THE STATE OF ALASKA

I, Josephine M. McPhetres, Clerk of the
Supreme Court of the State of Alaska, do hereby certify
that

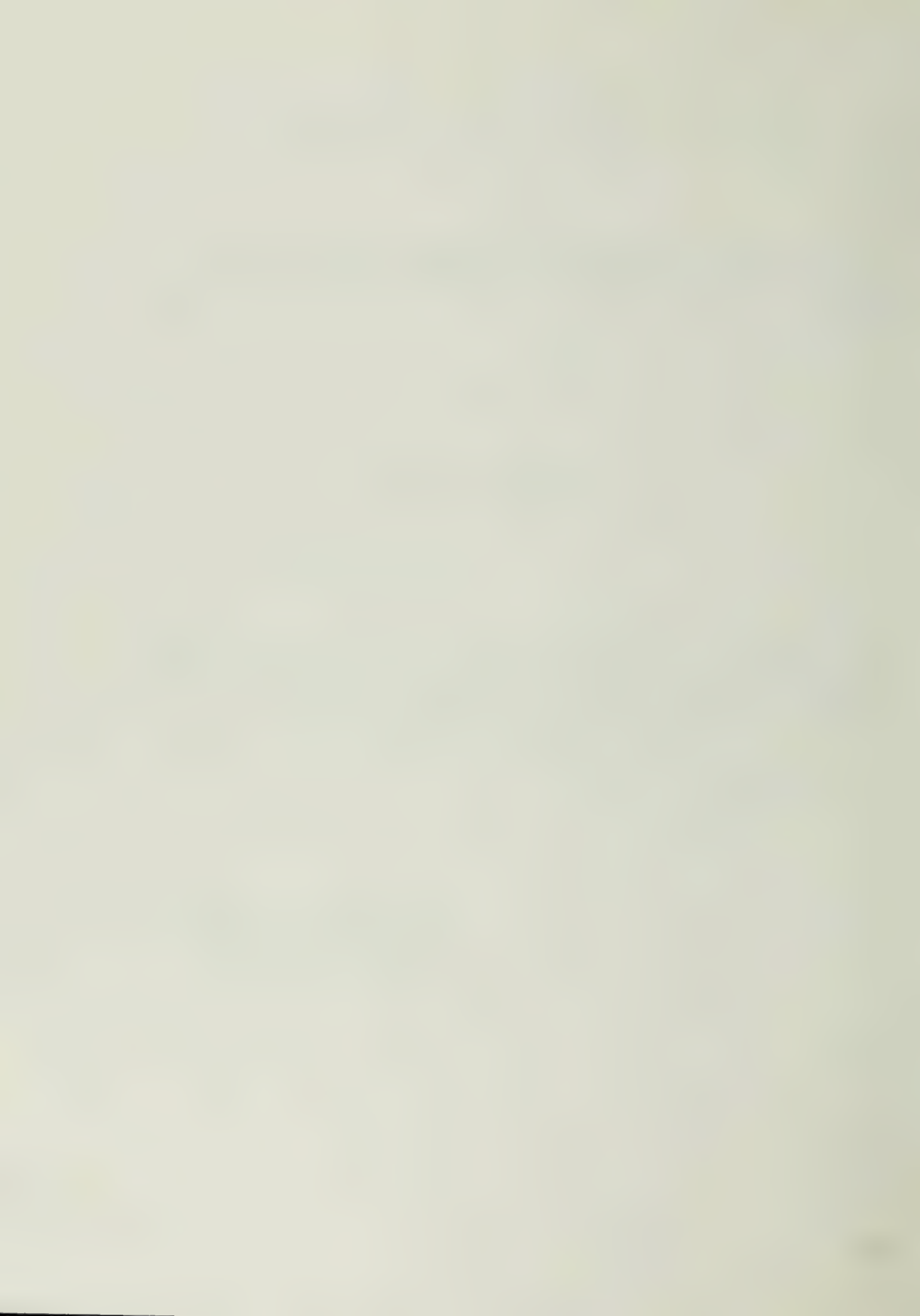
M. ASHLEY DICKERSON

was admitted to practice before all courts of the State
of Alaska on June 11, 1959, that her professional and
private character appears to be good and that she is
presently in good standing in this court.

Dated at Juneau, Alaska this 31st day of
August, 1965.

JOSEPHINE M. MCPHETRES
Clerk, Supreme Court,
State of Alaska.

[SEAL]



Officers

EUGENE WILES
PRESIDENT, ANCHORAGE
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SECRETARY, ANCHORAGE
JAMES N. WANAMAKER
EXECUTIVE SECRETARY,
STATE BAR COUNSEL, ANCHORAGE
J. E. HAVELOCK
COMMISSIONS CHAIRMAN, ANCHORAGE

ALASKA BAR ASSOCIATION

P. O. BOX 279
ANCHORAGE, ALASKA
May 10, 1967

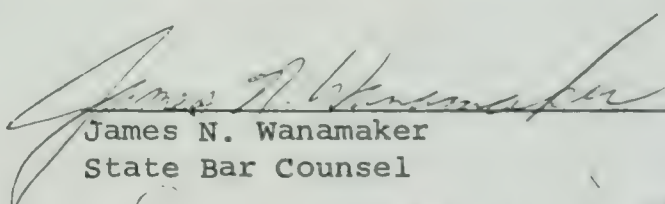
Board Members

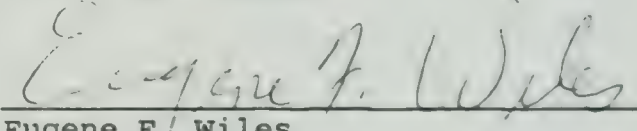
ROBERT J. ANNIS
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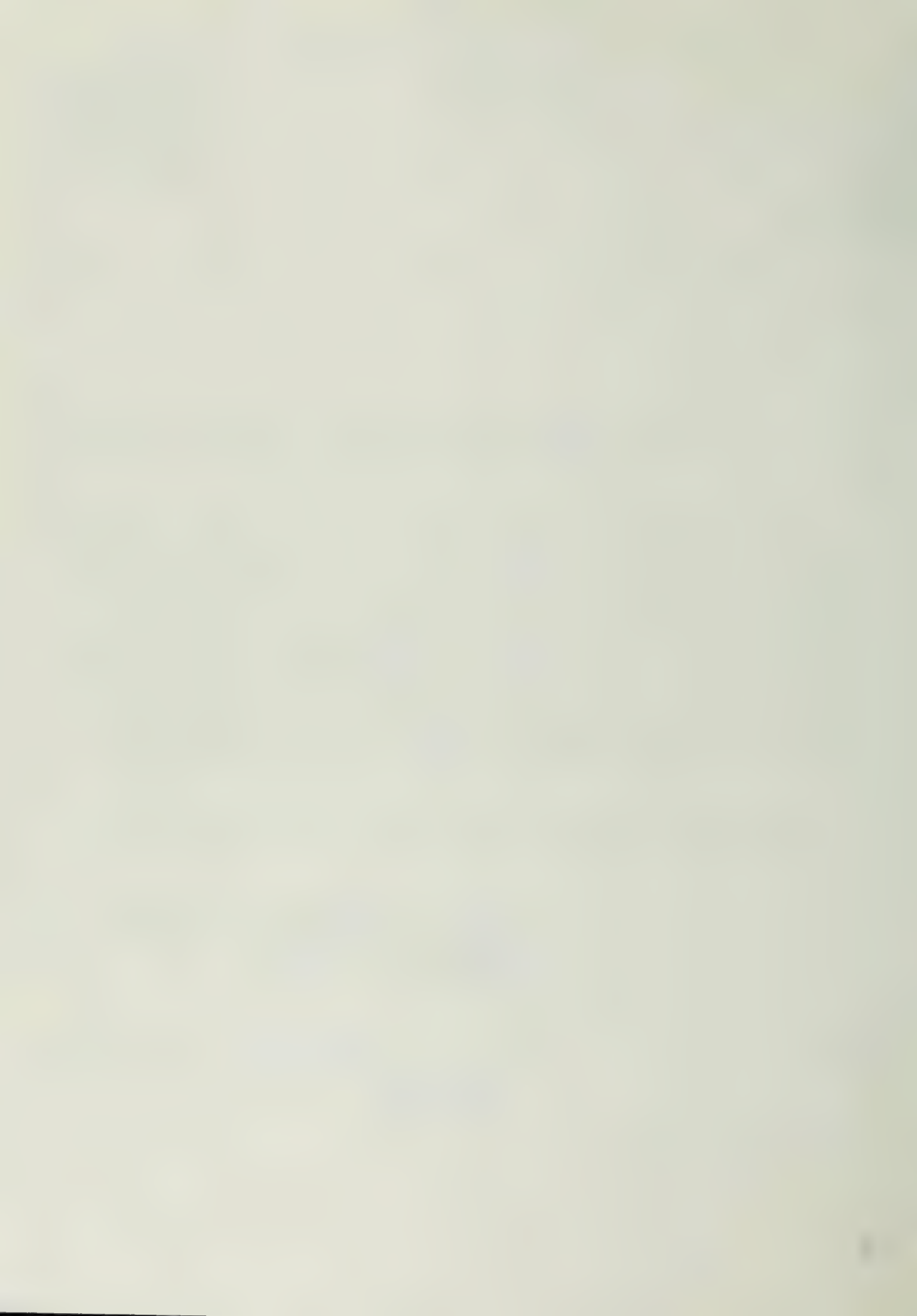
Re: Grievance Against: M. Ashley Dickerson
Complainant: Robert C. Erwin

This letter will signify that the grievance complaint before the Alaska Bar Association in this matter has been terminated upon the recommendation of Clifford J. Groh, Special Bar Counsel in this matter, which recommendation was concurred in by Roger G. Connor, acting in the capacity of President of the Alaska Bar Association. It should be noted that Mr. Connor, who is presently Vice-President of the Association, accepted this duty at the request of President Eugene F. Wiles, since Mr. Wiles disqualified himself from acting in this case.

Therefore, all grievance proceedings in this matter are officially closed.


James N. Wanamaker
State Bar Counsel


Eugene F. Wiles
President



United States Court of Appeals
FOR THE NINTH CIRCUIT

MONTE VISTA LODGE,

Appellant,

vs.

THE GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,

Appellee.

On Appeal From the United States District Court
For the Southern District of California
Southern Division

PETITION FOR REHEARING

RUBIN, SELTZER & SOLOMON
By: JOSEPH J. FISCH
3003 Fourth Avenue
San Diego, California 92103

Attorneys for Appellant

FILED

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403 E. GATE STREET

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21303

MONTE VISTA LODGE,

Appellant,

vs.

THE GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appellant, MONTE VISTA LODGE, respectfully petitions this court for a rehearing and urges the court to reconsider the anomalous condition which it has created within the Bankruptcy Act as a result of its reasoning and judgment in this matter. The grounds for this petition are the following.

1. Chapter X and Chapter XII of the Bankruptcy Act are the only two chapters where special consideration is given to so-called "FHA-insured mortgages". (§ 263 of Chapter X and § 517 of Chapter XII.) However, Chapter X and Chapter XII are the only two chapters which contain what is referred to as a "cram-down" provision where, even against the opposition of an entire class of secured creditors, the court may confirm an arrangement affecting such non-consenting creditors.

(§ 216(8) of Chapter X and § 461(11) of Chapter XII.) As a result of the court's decision, in a Chapter X or XII case the court would not permit even a temporary restraint over a foreclosure of an FHA-insured mortgage, despite the cram-down provision in such chapters where not only can secured creditors be restrained but their indebtedness can be modified and altered. However, in a straight bankruptcy proceeding or in a Chapter XI case, where there is no cram-down provision and where secured indebtedness cannot be modified or altered, this court would allow the temporary restraint of a foreclosure of an FHA-insured mortgage.

2. Page 4 of the Opinion of this court's judgment appears to state that the District Court does not even have jurisdiction over the real estate itself, as distinguished from the jurisdiction to restrain the foreclosure. If there were to be an adjudication of this appellant as a bankrupt, or if there were to be a modification of the proceeding so that it fell within Chapter XI rather than Chapter X of the Bankruptcy Act, the District Court would have jurisdiction not only over the property but over the respondent as well. The jurisdiction of the Bankruptcy Court over property asserts itself at the time of the initial filing of a proceeding in the Bankruptcy Court, and is not dependent upon the particular chapter under which such proceeding falls. The Bankruptcy Court must retain jurisdiction over all property involved

in chapter proceedings, so as to maintain the status quo in the event of an adjudication of the debtor as a bankrupt. The Opinion of this court appears to create an inconsistent position with the foregoing.

Respectfully submitted,

RUBIN SELTZER & SOLOMON

By: /s/ JOSEPH J. FISCH

Attorneys for Appellant.

CERTIFICATION OF MERIT

I, JOSEPH J. FISCH, hereby certify that in connection with the preparation of this petition I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing petition is in full compliance with those Rules.

I further certify that in my judgment this petition is well founded and I further certify that this petition is not interposed for the purpose of delay. I have discussed with other counsel the filing of such a petition for rehearing and they are in agreement that there is merit to the position set forth in the accompanying petition.

/s/ JOSEPH J. FISCH

No. 21306 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER M. ELLIOTT, as Trustee in Bankruptcy for the
Estate of HENRY H. HERRERA, dba U. S. EAGLE
FERTILIZER CO. and GARDENLAND NURSERY, Bank-
rupt,

Appellant,

vs.

HENRY H. HERRERA, dba U. S. EAGLE FERTILIZER CO.
and GARDENLAND NURSERY, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

CRAIG, WELLER & LAUGHARN,

By ROBERT A. FISHER,

458 South Spring Street,

Suite 812,

Los Angeles, California,

Attorneys for Appellant.

FILED

FEB 10 1967

WM. B. LUCK, CLERK

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No. 21306

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PETER M. ELLIOTT, as Trustee in Bankruptcy for the
Estate of HENRY H. HERRERA, dba U. S. EAGLE
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rupt,

Appellant,

vs.

HENRY H. HERRERA, dba U. S. EAGLE FERTILIZER CO.
and GARDENLAND NURSERY, Bankrupt,

Appellee,

APPELLANT'S OPENING BRIEF.

This is an appeal from an Order entered on July 22, 1966, by the Honorable Leon R. Yankwich, Senior United States District Judge, denying appellant's Petition for Review from an Order entered by the Honorable Robert B. Powell, Referee in Bankruptcy, which said Order was entered on March 2, 1966, and overruled appellant's Specifications of Objection to the Bankrupt's Discharge and granted the bankrupt a discharge from his debts.

I.

JURISDICTIONAL STATEMENTS.

On or about June 7, 1965, appellant, as trustee, filed with the Referee his Specifications of Objections to the Bankrupt's Discharge [R. 23].

After extensive hearings and testimony the Referee entered his Order on March 2, 1966, granting the bankrupt's discharge [R. 110]. On March 4, 1966, appellant filed his Petition for Review of said Order [R. 115] and thereafter on July 22, 1966, the Honorable Leon R. Yankwich, Senior United States District Judge, entered his Order denying said Petition for Review [R. 143].

On August 10, 1966, and within the time allowed by law, your appellant filed a Notice of Appeal [R. 144], and your appellant has taken the steps required by law in presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Section 24 of the National Bankruptcy Act (Title 11 U.S.C. §47).

II.

STATEMENT OF FACTS.

In general, appellant, as trustee, objected to the bankrupt's discharge upon the following grounds, to wit:

- (1) That the transfer by the bankrupt of the assets of U. S. Eagle Fertilizer Co. to Park Green Enterprises, Inc., a corporation, formed by his son for that purpose, was made with intent to hinder, delay and defraud and bankrupt's creditors.
- (2) That the bankrupt failed to maintain adequate books and records from which his financial condition and business transactions might be ascertained.

(3) That the bankrupt has failed to satisfactorily explain losses of assets, in that he had failed to satisfactorily explain:

- (a) The difference of a purported net worth of \$169,772.00 as of September 30, 1963, and a deficit net worth of \$128,532.00, as shown by the bankrupt's schedules, A DIFFERENCE OF SOME \$298,000.00.
- (b) The disposition of the \$25,000.00 purportedly received from the sale of U. S. Eagle Fertilizer Co. assets.

There were other specifications but appellant concedes that the evidence would not support them and that the Referee properly overruled them.

The Referee's Findings of Fact and Conclusions of Law, it is submitted, are clearly erroneous and should be reversed by this Honorable Court. The Referee's Findings of Fact and Conclusions of Law are merely recitations of appellant's Specifications of Objections to Discharge with the phrase "It is not true that" tacked on the front.

The District Court, we must assume, adopted the Referee's Findings of Fact and Conclusions of Law, as the District Court Judge, at the hearing on the aforesaid Petition for Review on July 18, 1966, ruled from the bench that "In matters of this type, we must go along with the Referee."

The bankruptcy proceeding was instituted by the filing of an involuntary petition on March 20, 1964.

The bankrupt was engaged in business as a sole proprietor in the fertilizer and nursery business under the names of U. S. Eagle Fertilizer Co. and Gardenland

Nursery. The bankrupt's son, John or Johnny Herrera acted as the bankrupt's general manager and managed the fertilizer end of the business, at least.

On or about November 11, 1963, the bankrupt purportedly transferred the assets of U. S. Eagle Fertilizer Co. to a corporation formed by his son, John Herrera, for that purpose — said corporation being Park Green Enterprises, Inc. This transfer was on a sale and lease back arrangement with the bankrupt remaining in possession and operating until about the first of February, 1964, at which time Park Green Enterprises, Inc. apparently took over and the bankrupt then became the employee of Park Green Enterprises, Inc. The testimony is not clear as to the exact date when this transformation took place.

The aforesaid transfer by the bankrupt to the corporation formed by his son, was for the purchase price of \$25,000.00, with the bankrupt leasing the assets back at \$800.00 per month.

John Herrera's testimony was that part of the purchase price was acquired from his "savings" kept in a metal box in his home [Transcript, June 3, 1965, p. 22, lines 1-5; p. 23, lines 1-26]. The rest was "borrowed" from his relatives and \$15,000.00 was "borrowed" from a concern named Horticultural Products, Inc.

Park Green Enterprises was formed in October, 1963 as a leasing business. The first assets it ever had were the U. S. Eagle Fertilizer Co. assets, which it leased to the bankrupt for \$800.00 per month, and a bank account. Park Green had no other operating income until approximately the first of February, 1964, yet for the period of November 11, 1963 to January 31, 1964, Park Green's bank account shows deposits of over \$40,000.00!

[Trustee's Ex. 13]. This is the bank account from which the \$25,000.00 came from for the purchase of the U. S. Eagle assets.

As will be noted from trustee's Exhibit 13, a considerable portion of the deposits came from Horticultural Products, Inc., which eventually ended up with a chattel mortgage on the U. S. Eagle assets. It is also interesting to note that the opening deposit into Park Green's bank account on November 11, 1963, included a cashier's check from the bankrupt.

As will also be noted from the Bankrupt's Answers to Second Set of Interrogatories, the bankrupt's income from Horticultural Products stopped at the time when checks from Horticultural Products in odd amounts started being deposited in Park Green's bank account. However, the bankrupt was supposedly still in possession of the U. S. Eagle assets and operating until the end of January, 1964.

In May of 1963, a letter was prepared and sent to the bankrupt's suppliers informing them that Horticultural Products, Inc. had purchased all of the U. S. Eagle business [Trustee's Ex. 6]. However, according to Mr. Turfryer's testimony this really did not come about [Transcript, September 11, 1964, p. 39, line 18; p. 42]. However, Horticultural Products eventually ended up with a chattel mortgage on all of these assets [Trustee's Ex. 11]. Mr. Turfryer testified that the consideration for the chattel mortgage was antecedent indebtedness of the bankrupt dba U. S. Eagle Fertilizer Co. [Transcript, September 10, 1965, p. 26; Transcript, September 11, 1964, p. 97, line 11; p. 99, line 14]. John Herrera testified, however, that the chattel mortgage was given to secure monies loaned from Horticultural to

Park Green to buy the U. S. Eagle assets [Transcript, June 3, 1965, p. 11, line 25; p. 12]. Eugene E. Glushon, the attorney for the bankrupt, represented Park Green and Horticultural Products in this transaction [Transcript, September 11, 1964, p. 94, lines 4-17].

The bankrupt's "books and records" turned over to the trustee consisted of one 40 gallon trash can and two fertilizer sacks and one small box filled with miscellaneous loose statements, invoices, correspondence, bank statements and some check stubs [Transcript, January 10, 1966, p. 25, line 17; p. 26, line 6].

Without going into specifics the entire testimony of Hal Riger [Transcript, August 28, 1964] and Gerald G. MacDonald [Transcript, September 10, 1965, October 12, 1965 and January 10, 1966] are replete with testimony that the bankrupt's records were such that his business transactions and financial condition could not be ascertained at any one time.

It is felt that the Court's particular attention should be called to the fact that the bankrupt's financial statement of September 30, 1963 [Trustee's Ex. 8] showed, among other things, accounts receivable in excess of \$75,000.00, and the bankrupt's schedules [Trustee's Ex. 9] list accounts receivable of \$8,000.00 as an asset.

According to the testimony presented to the Referee the status of the bankrupt's books and records were such that it is impossible to determine what specific accounts made up the \$75,000.00 plus figure, *or* what specific accounts made up the \$8,000.00 figure [Transcript, October 12, 1965, p. 8, line 23, to p. 10, line 12]. As to the \$8,000.00 in accounts receivable scheduled as an asset by the bankrupt, appellant, as receiver and

trustee was and is unable to even send demand letters to the account debtors *because the bankrupt's books and records do not disclose who they are (if they do, in fact exist)!*

As to the disposition of the \$25,000.00 received from the sale of the U. S. Eagle Fertilizer Co. assets, the bankrupt has testified that it "went back into the business." The trustee's accountant testified that the first two checks were deposited to the bankrupt's bank account and from this \$3,200.00 went back to Park Green Enterprises, Inc. as "rent." The other checks [Trustee's Ex. 2] according to the bankrupt's testimony and the accountant's report [Trustee's Ex. 10] were cashed by the bankrupt. The bankrupt testified that this money was deposited to his bank accounts from time to time as needed. These three checks total \$15,000.00, and the first of which was dated December 18, 1963. The accountant's report [Trustee's Ex. 10] reflects that all deposits to all of the bankrupt's bank accounts from and after December 18, 1963 totalled \$11,621.94. Even assuming first that the bankrupt had no other revenue from and after December 18, 1963 (which the bankrupt has not contended) this is still approximately \$3,400.00 unaccounted for.

The bankrupt's financial statement as of September 30, 1963 [Trustee's Ex. 8] reflects a net worth of \$169,772.00 while the bankrupt's schedules [Trustee's Ex. 9] reflect a deficit net worth of \$128,532.00. This represents a loss of some \$298,000.00 in the short period of about five months. *And, the record is completely void of any explanation of this whatsoever by the bankrupt.*

III.

SPECIFICATION OF ERRORS.

The Order of the United States District Court Denying Appellant's Petition for Review and in Effect Affirming the Referee Is Erroneous in That:

- (1) The Order of the Referee is based on the following clearly erroneous findings of fact, to wit:
 - (a) It is not true that the bankrupt destroyed, mutilated, falsified, concealed or failed to keep or preserve books of accounts or records, from which his financial condition and business transactions might be ascertained, while engaged in business under the firm name and style of U. S. EAGLE FERTILIZER CO.
 - (b) It is not true that the bankrupt, on or about November 11, 1963, or at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, nor did the bankrupt permit some of his property to be removed, destroyed or concealed with the intent to hinder, delay, or defraud his creditors.
 - (c) It is not true that the bankrupt has failed to satisfactorily explain loss of assets or a deficiency of assets to meet his liabilities. It is not true that the bankrupt failed to ex-

plain the disposition of funds in the approximate sum of \$25,000.00 received from the sale of the bankrupt's business, known as U. S. EAGLE FERTILIZER CO.

(2) The Order of the Referee is based on the following erroneous conclusions of law:

(a) The bankrupt did not destroy, mutilate, falsify, conceal or fail to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained, and did not violate Section 14C (2) of the Bankruptcy Act.

(b) The bankrupt did not transfer or conceal any property within the twelve months immediately preceding the filing of the petition in bankruptcy, with the intent to hinder, delay or defraud his creditors, and did not violate Section 14C (4) of the Bankruptcy Act.

(c) The bankrupt did not fail to explain satisfactorily any loss of assets or deficiency of assets to meet his liabilities, or fail to explain the disposition of the proceeds received from a sale of his business, nor did the bankrupt violate Section 14C (7) of the Bankruptcy Act.

(3) The District Court was in error in denying appellant's Petition for Review from the Referee's Order.

IV.

SUMMARY OF ARGUMENT.

- (A) THE FINDINGS OF THE REFEREE ARE CLEARLY ERRONEOUS.
- (1) The Bankrupt Transferred Assets Within Twelve Months Prior to Bankruptcy With Intent to Hinder, Delay or Defraud Creditors.
 - (2) The Bankrupt Failed to Keep or Preserve Books and Records From Which His Financial Condition and Business Transactions Might Be Ascertained.
 - (3) The Bankrupt Has Failed to Satisfactorily Explain Losses of Assets.
- (B) AT THE VERY MINIMUM, THE RECORD WAS SUFFICIENT TO SHIFT THE BURDEN OF PROOF TO THE BANKRUPT.
- (C) THE REFEREE APPLIED THE WRONG STANDARD IN GRANTING THE BANKRUPT'S DISCHARGE.

V.

ARGUMENT.

Introduction.

The instant appeal, in substance, asks for this Honorable Court to determine the question of whether or not the bankrupt should be granted a discharge from his debts, over objections thereto, if he has not committed any of the acts specified by the Bankruptcy Act as a bar thereto; or whether the criteria is that he should be granted a discharge if to deny it would be of no benefit to his creditors.

As will be pointed out hereinbelow, the latter is the criteria employed by the Referee, and the evidence overwhelmingly sustains the objections to discharge despite the "blanket" findings signed by the Referee.

**A. The Findings of the Referee Are
Clearly Erroneous.**

1. The Bankrupt Transferred Assets, Within Twelve Months Prior to Bankruptcy With Intent to Hinder, Delay or Defraud Creditors.

Section 14(c)(4) of the Bankruptcy Act [Title 11 U.S.C. §32(c)(4)] provides that the bankrupt's discharge should be granted unless satisfied that the bankrupt has:

"at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay or defraud his creditors;"

It is well settled that proof of fraudulent intent is seldom capable of direct proof but must be inferred from the circumstances. *McWilliams v. Edmonson* (5th Cir. 1947), 162 F. 2d 454, cert. den. 332 U.S. 835; *Chorost v. Grand Rapids Factory Show Room, Inc.* (3rd Cir. 1949), 172 F. 2d 327; and here since the transferee was a corporation formed by the bankrupt's son and general manager, for that purpose, the transaction is subject to stricter scrutiny since the relationship of father-son and principal-agent was a fiduciary one, see *McWilliams v. Edmonson* (5th Cir. 1947), 162 F. 2d 454, cert. den. 332 U.S. 835 and Volume 4 Rem-

Collier on Bankruptcy (14th Ed.), Section 67.37(3).

The aforesaid amusing game of musical chairs whereby the bankrupt's son, who was also the manager of the bankrupt's business, ends up as the bankrupt's employer and with the bankrupt's assets still in the family, leaving the bankrupt with unpaid creditors of over \$80,000.00, it is submitted, is the rankest kind of nepotism which should convince any Court that this bankrupt should not be discharged from his debts.

Even if we ignore, for the sake of argument, the foregoing fraudulent conduct, the bankrupt's testimony clearly and unequivocally shows that the purpose of the transfer was to avoid attachments by the bankrupt's creditors [Transcript, August 7, 1964, p. 21, lines 2-8]. *This alone would be sufficient* to deny the bankrupt's discharge, as this would constitute a hindrance of creditors as a matter of admitted fact. *In re Rowe*, United States District Court, E.D. N.Y., September 30, 1964, reported in C.C.H. Bankruptcy Law Reporter 61,194, October 28, 1964.

2. The Bankrupt Failed to Keep or Preserve Books and Records From Which His Financial Condition and Business Transaction Might Be Ascertained.

Section 14(c)(2) of the National Bankruptcy Act [Title 11, U.S.C. §32(c)(2)] provides that the bankrupt's discharge should be granted unless satisfied that the bankrupt has:

“destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case;”

As stated in Volume 1, Collier on Bankruptcy (14th Ed.), §14.30 on pages 1353 and 1354:

"Although it has been stated generally, in issues raised on objections to discharge, that the provisions of §14 should be resolved in favor of the bankrupt, such a statement should be qualified by noting that the interests protected by clause (2) 'are those of creditors and that the bankrupt is required to take such steps as ordinary fair dealing and common caution dictate *to enable the creditors to learn what he did with his estate.*' Within the broad language of this provision, as defined by the exercise of a sound judicial discretion, if the facts disclose a breach of the bankrupt's duty to creditors to keep or preserve proper books or records and he fails to establish facts and circumstances in justification thereof, a discharge should be denied.

The requirement is imposed to enable creditors, with the assistance of proper books and records, to ascertain the true status of the bankrupt's affairs and to test the completeness of the disclosure requisite to a discharge". (Citations omitted and emphasis added).

In the case of *In re Brod* (D.C.N.D. Ga., 1909), 166 Fed. 1011 the court denied the bankrupt's discharge on the grounds that he had concealed, destroyed or failed to keep books and records from which his financial condition might be ascertained, where there was a shrinkage of \$10,000.00 in a bankrupt's assets within a period of thirteen months, and the bankrupt failed to show from his books what became of his property.

In the instant case we have not only the disposition of the \$25,000.00 received from the sale to Park Green Enterprises but the loss of some \$298,000.00 in the period of five months, neither of which is reflected by the bankrupt's books and records. And, as mentioned hereinabove there are absolutely no records reflecting the nature, extent or disposition of the accounts receivable.

3. The Bankrupt Has Failed to Satisfactorily Explain Losses of Assets.

Section 14(c)(7) of the Bankruptcy Act [Title 11 U.S.C. §32(c)(7)] provides that the bankrupt should be granted a discharge unless satisfied that the bankrupt:

“has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities.”

In this particular we are concerned with the disposition of the \$25,000.00 received by the bankrupt in connection with the transfer of the assets to Park Green Enterprises and with an explanation of how the bankrupt's financial condition changed from a net worth of \$169,772.00, as shown by the financial statement of September 30, 1963 [Trustee's Ex. 8] and a deficit net worth of \$128,532.00 at the date of bankruptcy some five months later. As to the latter point, the bankrupt did not give even a semblance of an explanation, and it is submitted that it is apparent no plausible explanation could be given. As to the said \$25,000.00, only approximately \$10,000.00 was shown to have been deposited to the bankrupt's bank account.

As stated in Vol. 1 Collier on Bankruptcy (14th Ed.) §14.60 at pages 1436 and 1437:

"An explanation which is based mostly upon an estimate of the bankrupt, *founded upon nothing by way of verification or affirmation by means of books, records or otherwise* has been held unsatisfactory. Even though the underlying facts referred to by a bankrupt may suggest a plausible explanation, the testimony may be so general as to be insufficient. *More is required of the bankrupt in the way of explanation than mere generalities.*" (Emphasis added.)

From the "explanations" of the bankrupt we cannot rule out the possibility that some of the aforesaid \$25,000.00, which was converted into cash, went into the bank account of Park Green Enterprises [Trustee's Ex. 13]. The desirability of avoiding speculations such as this is just the reason why Congress has seen fit to enact Sections 14(c)(2) and 14(c)(7) of the Bankruptcy Act.

As the Court stated in denying the discharge of a bankrupt in *In re Shapiro & Ornish* (D.C. Tex. 1929), 37 F. 2d 403, *aff'd Shapiro & Ornish v. Holliday* (5th Cir.), 37 F. 2d 407, at page 406:

"The word 'satisfactorily', as contained in the amendment referred to, may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has the mental attitude which finds contentment in saying that he believes the explanation—he believes what the bankrupts say with reference to the disappearance or the shortage. He is satisfied. He no longer wonders. He is content".

In the instant case, not only did the bankrupt not say anything, from what he did say, we must still wonder—we must still be discontented.

B. At the Very Minimum, the Record Was Sufficient to Shift the Burden of Proof to the Bankrupt.

It is submitted by appellant that the District Court and the Referee failed to place the necessary importance on the 1926 amendment to Section 14(c)(7) of the Bankruptcy Act [Title 11 U.S.C. §32(c)(7)], which states:

“Provided, That if, upon hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.”

As stated in Volume 1 Collier on Bankruptcy (14th Ed.) §14.12 at page 1314:

“This statutory provision alters the earlier construction of the statute adopted by the cases. The burden which shifts now upon a showing of reasonable grounds is not a *burden of going forward* with the evidence requiring the bankrupt to explain away natural inferences, but a *burden of*

proving that he has not committed the objectionable acts with which he has been charged;—If the evidence is in a state of substantial equilibrium, the discharge must be denied since the bankrupt has failed to carry his burden of proof." (Emphasis, the author's; Citations omitted).

As stated by the Court, in *Federal Provision Co. v. Ershowsky* (2nd Cir., 1938), 94 F. 2d 574:

"The amendment of 1926 has revolutionized the procedure in discharge; the bankrupt may no longer remain inert, standing upon the infirmities of the evidence against him; once a *prima facie* case appears, the laboring oar passes to his hands and he must bring the boat to shore. It is he who has caused the loss, who has access to the facts, and who alone knows what the explanation is; let him make it, let him satisfy the court that it really explains. Else he will not be discharged. We cannot see how the judge, or any other impartial person, could think that these bankrupts had explained anything whatever."

In the instant case, it is submitted, that the evidence introduced by appellant is overwhelmingly sufficient to sustain the objections to discharge, and the bankrupt did not bear his burden of proof.

C. The Referee Applied the Wrong Standard in Granting the Bankrupt's Discharge.

Rather than considering the evidence presented by appellant and considering the above matters which, it is submitted, could *only* lead to the denial of the bankrupt's discharge, the Referee felt that it would not do the creditors any good and therefore granted the bankrupt's discharge.

As stated by the Referee in making his decision [Transcript, January 10, 1965, p. 36, lines 10-23] :

“THE REFEREE: Ready for the decision? This bankruptcy has been pending about three years. We have had copious amounts of testimony. We have had Mr. Joe Potts in here who looked like he was going to make a veritable lifetime job out of this. Finally, we had to separate Mr. Potts and some of the witnesses and attorneys. *So, we are all of the opinion that Mr. Herrera must have been one of the biggest crooks in the world; and, then, the books and records are not in too good shape, but I don't think it will do the creditors a bit of good to deny his discharge; and from a practical standpoint, let's don't waste too much time and argument here despite all the evidence that Mr. MacDonald cleverly made in the exhibits that I struck. So, I will allow his discharge*” (emphasis added).

VI.
CONCLUSION.

It is submitted that the record clearly shows that the bankrupt, by his acts and conduct has not placed himself outside of the provisions of Section 14 of the Bankruptcy Act, and his discharge should be denied. It is also submitted that the Referee's Findings of Fact, Conclusions of Law and Order are clearly erroneous and the District Court's Order denying Appellant's Petition for Review is erroneous for the reason that the Referee applied the wrong standard in holding that the bankrupt is entitled to a discharge because, as a practical matter, it would do his creditors no good to deny it.

It is therefore respectfully submitted that the District Court's Order denying appellant's Petition for Review should be reversed and the bankrupt's discharge should be denied.

Respectfully submitted,

CRAIG, WELLER & LAUGHLIN,

By ROBERT A. FISHER,

Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FISHER

APPENDIX.

Page Reference to
Where Exhibits
Were Identified,
Offered, Received

<u>Exhibit</u>	<u>Transcript Of:</u>	<u>or Rejected</u>
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Trustee's # 2	September 10, 1965	7
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No. ~~23,318~~ A, B

United States Court of Appeals
For the Ninth Circuit

WILLIS K. BAKER, JR., and MERVIN "BUD" CORNELSEN,	} <i>Appellants,</i>
VS.	
UNITED STATES OF AMERICA,	
	<i>Appellee.</i>

APPELLANTS' PETITION FOR A REHEARING

GEORGE T. DAVIS,
745 Market Street,
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*Attorney for Appellants
and Petitioners.*

FILED

MAY 3 1968

WM. B. LUCK, CLERK

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**United States Court of Appeals
For the Ninth Circuit**

WILLIS K. BAKER, JR., and MERVIN "BUD" CORNELSEN,	} <i>Appellants,</i>
VS.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

APPELLANTS' PETITION FOR A REHEARING

To the above-entitled court, as constituted in the original hearing:

Both appellants respectfully petition for rehearing, upon the following grounds:

1. THE DECISION FAILED TO RULE ON THE SPECIFIED ERROR OF MISCHARGING THE JURY: "THERE IS NOTHING DIFFERENT IN THE WAY A JURY IS TO CONSIDER THE PROOF IN A CRIMINAL CASE FROM THAT IN WHICH ALL REASONABLE PERSONS TREAT ANY QUESTION DEPEND-
ING UPON EVIDENCE PRESENTED TO THEM."¹

No more prejudicial or sedating misinstruction could have been given this jury, especially at the end of these lengthy and complicated instructions. (RT 1286.) Of course the usual reasonable doubt instructions were dutifully given early in the business. (RT

¹Page 22, Appellants' Opening Brief (hereinafter called AOB); and subdivision (c) of that point of error, at 24-25 AOB.

1263-1264.) But then came 22 more pages of complicated instructions. At the precise point where the normal juror was saying to himself, "This is all very well and very complicated, and you say I have to sort it out and determine if defendants are guilty; but how in the world am I to do it?"—then, came the misinstruction: Just go out and decide this case in the same way you would treat "any question depending upon evidence," said the court to the jury; and the jury did.

Such instruction was clearly erroneous and prejudicial. It washed out the practical application of reasonable doubt in this extremely close case. It deprived defendants of the fair trial guaranteed them by the due process clause of the Fifth Amendment, United States Constitution.

The important point was not ruled upon or discussed in the decision herein of April 4, 1968.²

Cases correctly setting forth the correct standard include:

Norwitt v. U.S., 195 Fed. 2d 127, 134;

Williams v. U.S. (9th Cir.), 271 Fed. 2d 703, 704;

Henderson v. U.S. (9th Cir.), 143 Fed. 2d 681, 682;

Rose v. U.S., 149 Fed. 2d 755, 759;

U. S. v. Belisle, 107 Fed. Supp. 283, 285.

²It is interesting to note that the instruction complained of here is not tolerated in the chapter, "Evidence Evaluation", *Jury Instructions in Federal Cases* (Seventh Circuit Judicial Conference Committee on Jury Instructions, Judge Walter J. LaBuy, Chairman), hereinafter cited as "LaBuy".

II. THIS ANTI-REASONABLE DOUBT INSTRUCTION DEPRIVED APPELLANTS OF THE FAIR TRIAL GUARANTEED THEM BY THE DUE PROCESS CLAUSE, FIFTH AMENDMENT, UNITED STATES CONSTITUTION.

The ground for rehearing on this point is set forth without argument pursuant to the rehearing Rule 23, Rules on Appeal; and by incorporation of Point I hereinabove.

III. THE TRIAL COURT CLEARLY ERRED IN TWICE INSTRUCTING THAT IT WAS NOT NECESSARY THAT THE GOVERNMENT PROVE THAT THE DEFENDANTS KNEW THAT THE STOLEN PROPERTY BELONGED TO THE UNITED STATES; AND THEREFORE THE TRIAL COURT SHOULD HAVE GRANTED MOTIONS FOR ACQUITTAL AND NEW TRIAL AS URGED IN THE FOURTH, FIFTH AND SIXTH SPECIFICATIONS OF ERROR.

After giving this erroneous instruction, the trial judge unduly emphasized it by repeating it. (RT 1283.) And the prosecutor told the jury:

“I believe the judge will instruct you that it isn’t even necessary that they know it’s stolen Government property; all they have to know is that this property is stolen. All they have to know is that Mr. Stephenson does not have the property rightfully; where he got it or how he got it isn’t important. . . .” (RT 1154.)

The Seventh Circuit gives diametrically opposed instructions on this issue:

“Section 19.01 Offense of Stealing Government Property

Defendant has been indicted for the crime of stealing property of the United States. To convict defendant of this crime the Government must

prove beyond a reasonable doubt that defendant unlawfully took without authority property owned by the United States, with knowledge that the property belonged to the United States, and with the specific intent to deprive the Government of its use.

Section 19.02 *Offense of Unauthorized Sale of Government Property*

Defendant has been indicted for the crime of selling property of the United States without authority. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant sold or disposed of property of the United States without authority to do so, and with knowledge that the property was owned by and was stolen from the United States.

Section 19.03 *Offense of Receiving Stolen Government Property*

Defendant has been indicted for the crime of receiving, concealing or retaining property stolen from the United States. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant received, concealed, or retained property owned by the United States with the intent to convert such property to his own use, and with knowledge that it has been stolen from the United States."

LaBuy.

The essential cases here confirming the Seventh Circuit rule are:

Souza v. U.S., 304 Fed. 2d 274, 277 (9th Cir.);

Schaffer v. U.S., 221 Fed. 2d 17 (5th Cir.);

Mora v. U.S., 190 Fed. 2d 749, 751 (5th Cir.).

IV. APPELLANTS REQUEST REHEARING FOR BETTER ELUCIDATION OF ALL THE SPECIFICATIONS OF ERROR RAISED IN THEIR OPENING BRIEF.

All the specifications of error take on more significant hue, in the context of the misinstructions above-mentioned.

SUMMARY

For the above reasons, and for the reason that none of the above points were effectively or at all ruled upon in the April 4, 1968 decision, appellants respectfully pray that a rehearing be granted, under Rule 23, Rules on Appeal.

Dated, San Francisco, California,

May 1, 1968.

GEORGE T. DAVIS,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and that said Petition in my judgment is well founded and not interposed for the purpose of delay.

GEORGE T. DAVIS,

*Attorney for Appellants
and Petitioners.*

N O. 2 1 3 2 0 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE NICHOLAS DOLLIVER, III

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

MAR 2 1967

WM. B. LUCK, CLERK

MAR 27 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE NICHOLAS DOLLIVER, III,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Eugene Nicholas Dolliver, III, Fred S. Trend
and Ronny Dean Sanderson, were indicted by the Federal Grand
Jury for the Northern Division of the Southern District of California,
on November 10, 1965, under No. 35485-CD [C. T. p. 2]. ^{1/} The
indictment in six counts charged violations of Title 21 U. S. C.
§176(a), concealment, transportation and sale of marijuana after
illegal importation. Co-defendant Ronny Dean Sanderson had died
prior to trial.

^{1/} "C. T." refers to Clerk's Transcript of Record.

On November 15, 1965, appellant was arraigned and entered a plea of Not Guilty; appellant was represented at trial by Court appointed counsel.

On December 13, 1965, the appellant was convicted after a trial by jury of Counts Four and Five of the indictment, Count Six having been dismissed earlier by the trial Court. On January 10, 1966, the appellant was sentenced to the custody of the Attorney General for a period of seven and one-half years on Count Four and Seven and one-half years on Count Five, the sentence on Count five to run concurrent with and not consecutive to the sentence on Count Four [C. T. p. 54].

Jurisdiction of the District Court was founded upon Title 21 U.S.C. §176(a). On January 13, 1966, a timely appeal was taken to this Court pursuant to Title 28, U.S.C. §1291, §1294(1) [C. T. p. 55].

II

PERTINENT STATUTE

Title 21, United States Code, §176(a) provides as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals,

buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marijuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III

STATEMENT OF THE CASE

A. The evidence was sufficient to convict appellant on Counts Four and Five as it proved the appellant was in constructive possession of the marijuana described therein.

B. STATEMENT OF FACTS

I. Counts One, Two and Three of the Indictment do not relate to the appellant Dolliver but charged that on August 26, 1965, defendants Fred S. Trend and Ronny Dean Sanderson concealed, transported, sold and illegally transferred 1419.5 grams of marijuana to Agent Anthony Morelli of the Federal Bureau of Narcotics, knowing that this marijuana had been illegally imported into the United States.

With respect to these first three counts, the evidence reflects that on August 26, 1965, at 1:15 P.M. Agent Morelli met defendants Trend and Sanderson at a bar and had a conversation with them concerning the purchase of marijuana [R. T. p. 50, lines 21-25; p. 51; p. 52, lines 1-14]. ^{2/} Trend, thereafter, left the bar ostensibly to get the marijuana [R. T. p. 52, lines 15-16]. Subsequently, Agent Morelli and defendant Sanderson left the bar and drove in Agent Morelli's car to the Pussy Willow Inn at Woodley and Saticoy Streets [R. T. p. 52, lines 6-10]. Upon parking at the Pussy Willow Inn, the defendant Trend appeared on foot alongside Agent Morelli's car [R. T. p. 54, lines 18-23]. Agent Morelli handed defendant Sanderson \$220.00 for two kilos of marijuana and Sanderson in turn handed, through the open window, the \$220.00 to the defendant Trend [R. T. p. 53, lines 16-25; p. 56, lines 1-8].

Thereupon, the defendant Trend ran from the car, entered

^{2/} "R. T." refers to Reporter's Transcript of Record.

a taxi cab and departed the area [R. T. p. 56, lines 5-11]. Agent Morelli and defendant Sanderson then exited the Agent's vehicle and walked to a 1953 Cadillac parked in the general vicinity [R. T. p. 57, lines 1-3]. Sanderson opened the trunk and delivered to Agent Morelli the marijuana described in Counts One, Two and Three of the Indictment [R. T. p. 57, lines 9-22].

II. Counts Four, Five and Six of the Indictment charged that on August 26, 1965, defendants Fred S. Trend, Ronny Dean Sanderson and the appellant Eugene Nicholas Dolliver concealed, transported, sold and illegally transferred 1919.75 grams of marijuana to Agent Morelli, knowing that this marijuana had been illegally imported into the United States.

At approximately 5:00 P.M. on August 26, 1965, Agent Morelli received a telephone call from Popeye, later described as an informant [R. T. p. 160, lines 1-4; p. 167, lines 8-10], who informed Agent Morelli that he had arranged for Agent Morelli to purchase three kilograms of marijuana. When Agent Morelli inquired of Popeye whether the sale would go through, Popeye stated "yes, I am sure. I will let you talk to the Dude. His name is Nick." [R. T. p. 162, lines 12-18]. Agent Morelli testified another person then talked to him on the phone at which time Agent Morelli asked "Is that you, Nick" to which the person responded "yes" [R. T. p. 162, lines 19-24]. Agent Morelli then had a conversation with Nick at which time the person affirmed he had three kilograms of marijuana to sell, to get down here quickly, and to meet him at the Panorama Bowling Alley [R. T. p. 163, lines 2-7].

At approximately 6:30 P. M. on August 26, 1966, Agent Morelli arrived at the Panorama Bowling Alley where Popeye introduced appellant Eugene Nicholas Dolliver, to Agent Morelli as "Nick" [R. T. p. 142, lines 15-16]. Agent Morelli had a conversation with the appellant in which appellant told Agent Morelli he had three kilos of marijuana to sell and that the price was \$140 per kilogram [R. T. p. 62, lines 20-22; p. 149, lines 9-13]. Appellant then instructed Agent Morelli to wait five minutes and to proceed to the Silver Fox Bar at Roscoe and Sepulveda [R. T. p. 62, line 25 to p. 63, lines 1-3]. The appellant then departed alone from the bowling alley [R. T. p. 63, lines 14-15].

Morelli and Popeye then drove to the Silver Fox Bar where they waited inside the bar. When appellant did not arrive immediately Popeye went out into the parking lot to look for appellant. Popeye returned to the bar to inform Morelli that " . . . Nick is outside waiting for you, he brought his connection with him . . . " [R. T. p. 164, lines 16-23]. When Morelli emerged from the bar he observed appellant with Ronny Dean Sanderson [R. T. p. 64, lines 5-12]. Sanderson then questioned Agent Morelli as to the circumstances of his being present again after their dealing earlier that day [R. T. p. 64, lines 23-25; p. 65, lines 9-14]. After an explanation by Agent Morelli, defendant Sanderson entered the agent's car where Morelli was again directed to the scene of the earlier sale -- the Pussy Willow Inn at Saticoy and Woodley [R. T. p. 62, lines 13-21]. Appellant Dolliver remained at the Silver Fox Bar [R. T. p. 64, line 25; p. 62, line 1].

Shortly after arriving at the Pussy Willow Inn co-defendant Trend again approached the agent's car. Another explanation was given defendant Trend, in Sanderson's presence, by Agent Morelli as to his unexpected return for more narcotics [R. T. p. 66, lines 18-19]. After placating defendant Trend, Agent Morelli attempted to have the purchase price reduced from \$140 per kilogram to \$110 per kilogram -- the amount paid in the morning transaction. Defendant Sanderson at this point told Agent Morelli that he should have dealt through him (Sanderson) as he had to pay other people in between [R. T. p. 66, lines 18-25]. Agent Morelli then handed Sanderson \$490 for the marijuana who, in turn, handed it to defendant Trend [R. T. p. 67, lines 12-18]. Trend thereafter left the location in a taxi cab. Defendant Sanderson and Agent Morelli proceeded to the 1953 Cadillac used in the earlier sale where the marijuana described in Counts Four, Five and Six were delivered by Sanderson to Agent Morelli [R. T. p. 57, lines 24-25; pp. 69-72, line 3].

Agent Morelli then returned to the Silver Fox Bar where Morelli again saw appellant Dolliver who asked "if anything went down all right" [R. T. p. 72, lines 18-21]. Appellant Dolliver left the area separately and Agent Morelli and Popeye departed in the agent's car.

IV

ARGUMENT

A. THE APPELLANT HAD CONSTRUCTIVE
POSSESSION OF THE MARIJUANA DE-
SCRIBED IN COUNTS FOUR, FIVE AND
SIX.

It is well settled that an Appellate Court in considering the sufficiency of the evidence must view the evidence together with all reasonable inferences in the light most favorable to the Government. Similarly, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Noto v. United States, 367 U.S. 290 (1961);

Glasser v. United States, 315 U.S. 60 (1942);

Byrne v. United States, 326 F.2d 825 (9th Cir. 1962).

Contrary to the argument of appellant (Appellant's Brief p. 9, lines 7-12), "constructive possession" may be proved by circumstantial evidence.

" . . . the circumstantial evidence of dominion and control is sufficient to justify a finding by the jury of constructive possession in appellant. . . ."

Hernandez v. United States, 300 F.2d 114, 117
(9th Cir. 1962);

Rodella v. United States, 286 F.2d 306, 312
(9th Cir. 1960);

(9th Cir. 1964).

This Court in Hernandez at p. 117 further stated:

"So long as the evidence establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of the third persons -- 'possession' as used in this statute included both actual and constructive possession. The power to control an object may be shared with others, and hence, 'possession' . . . need not be exclusive, but may be joint. "

In the instant case there is an abundance of uncontradicted evidence that appellant, Dolliver, had constructive dominion and control over the marijuana, which he held jointly with his co-defendants Sanderson and Trend.

1. On August 26, 1965, at approximately 5:00 P. M.

Agent Morelli had a telephone conversation with a person identified as "Nick" in which "Nick" stated he had three kilograms of marijuana for sale. The appellant's full name is Eugene Nicholas Dolliver [R. T. p. 163, lines 2-4].

2. The person identified as "Nick" on the telephone

directed Agent Morelli to proceed to the Panorama Bowling Alley [R. T. p. 163, lines 6-7].

3. At approximately 6:30 P. M. on August 26, 1965,

Agent Morelli was introduced to the appellant, Eugene Nicholas Dolliver as "Nick" at the Panorama Bowling Alley [R. T. p. 142, lines 15-16].

4. At the Panorama Bowling Alley, Agent Morelli had

a conversation with the appellant concerning the amount and price of marijuana. The appellant stated he had "three kilos of marijuana that he was going to sell at \$140 per kilogram" [R. T. p. 62, lines 20-22; p. 149, lines 9-13].

5. At that time, the appellant instructed Agent Morelli

to proceed to the Silver Fox Bar [R. T. p. 62, line 25; p. 63, lines 1-3].

6. At approximately 8:00 P. M. Agent Morelli met

appellant outside the Silver Fox Bar. At this time appellant, Dolliver, was with co-defendant, Ronny Dean Sanderson [R. T. p. 64, lines 10-12]. Sanderson expressed concern at the unexpected and "odd" appearance of Agent Morelli to purchase more marijuana so soon after their earlier transaction [R. T. p. 64, lines 23-25; p. 65, lines 9-14].

7. The appellant, Dolliver, engaged in a private con-

versation with co-defendant, Sanderson [R. T. p. 64, lines 19-20].

8. Agent Morelli and co-defendant Sanderson drove to

the vicinity of the Pussy Willow Inn where they were met by co-defendant, Fred S. Trend, who upon seeing Agent Morelli, also expressed concern at Morelli's unexpected return for more marijuana. Trend questioned Agent Morelli as to the use of a different

car and why he didn't purchase all the marijuana he desired earlier that day [R. T. p. 66, lines 18-25; p. 67, lines 6-10]. Agent Morelli persisted in his explanation and attempted to persuade Trend and Sanderson to reduce the purchase price per kilogram to the amount he had paid earlier [R. T. p. 66, lines 18-25; p. 67, lines 2-5]. However, the co-defendant insisted on the price originally established by appellant Dolliver, \$140 per kilogram [R. T. p. 66, lines 12-21].

9. Co-defendant Sanderson stated to Agent Morelli that he should have dealt through him directly as he has to pay other people in between [R. T. p. 66, lines 22-25].

10. Agent Morelli, thereafter returned to the Silver Fox Bar where he again saw appellant who asked "if everything went down all right" [R. T. p. 72, lines 18-21].

From the foregoing, it is clear that appellant, not Sanderson or Trend, made the initial contact with Agent Morelli for the sale of marijuana; that appellant established both the quantity of marijuana to be sold and its purchase price; that Agent Morelli was directed to the Silver Fox Bar where he was to meet co-defendant Sanderson by appellant; that the difference in the price from the earlier sale, \$110 per kilogram in which only Sanderson and Trend were involved to \$140 per kilogram most likely represented the appellant's profit from the transaction.

It should be noted that although the appellant states categorically that "later that day Sanderson and Trend divided the money", the record reflects that Trend testified he received only \$100 and

that allegedly the remainder was retained by Sanderson [R. T. p. 305, lines 9-11]. Although Appellant's brief relies on this testimony to raise the inference that Appellant Dolliver must therefore have received none of the proceeds of the sale, such a conclusion can not be drawn from the record. On the contrary the difference in the purchase price and Sanderson's statement that he had to pay others compels an opposite conclusion.

Certainly, the complicity of Appellant, Dolliver, in the instant offense is the same, if not greater than the participation held sufficient in Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960).

- (1) In Cellino, the purchasers, Velasquez and Ulrey, approached the defendant to purchase heroin. In the instant case Appellant Dolliver contacted Agent Morelli and initiated the sale of marijuana. Morelli did not seek out Appellant as was the case in Cellino.
- (2) In Cellino, the defendant neither set the price of the narcotics nor the quantity and was not present when the price or quantity was discussed. In the instant case, Appellant Dolliver established both the price and quantity of marijuana to be sold (to the exclusion of the other co-defendants).
- (3) In both Cellino and the instant case, the purchasers were taken to the "connection" by the respective appellants.
- (4) In Cellino, the negotiations to sell only commenced

when the defendant introduced the purchaser to the "connection". In the instant case the negotiations had been completed by the time the "connection" was brought into the scheme.

- (5) In the instant case, the increase in the amount of the purchase price per kilogram over the earlier sale can be attributed to the appellant's participation in the transaction. In Cellino, the defendant was not even aware of what the sale price was at the time of the sale.
- (6) In Cellino, the defendant remained in the vicinity of the sale because he had been transported there in the purchaser's car. In the instant case the appellant remained at the Silver Fox Bar until Morelli returned.

The case of United States v. Jones, 308 F. 2d 26 (2nd Cir. 1962), is also clearly distinguishable from the present fact situation. In Jones, at p. 31, the court relied on the following factors in concluding the defendant had no constructive possession of the narcotics:

- (1) The pains Jones took to locate and find his "connection", indicated that Jones was unable to consummate the transaction as a business dealing of his. In the instant case the transaction had been prearranged. There was no searching for a "connection" to sell marijuana. Appellant knew exactly who his associates were and appeared without delay in the company

of Sanderson at the Silver Fox Bar.

(2) In Jones, the defendant did not discuss the price and place of delivery until the defendant spoke with his "connection". In the instant case, the appellant had arranged the price and quantity of marijuana before Agent Morelli was aware there were others involved in the sale. Once, the other co-defendants did appear on the scene, the price set by appellant did not change.

(3) In Jones, the "connection" instructed the purchaser in the future "not to deal with anyone else". In the instant case no such demand was made of Agent Morelli. It was left solely to Agent Morelli's discretion with whom he would deal in any future transaction.

It does not detract from appellant's facilitation of the sale of the marijuana that appellant was not present at the scene of the transfer of the marijuana. In United States v. Malfi, 264 F.2d 147, 149 (3rd Cir. 1959), the appellant was not even in the same state at the time of the sale. It is not uncommon for one of the parties to a sale to remain behind while another participant takes the purchaser to the cache. United States v. La Rocca, 224 F.2d 859, 860 (2nd Cir. 1955); Brown v. United States, 222 F.2d 293, 297 (9th Cir. 1955).

Clearly, appellant's role in the scheme was not so minor as to fail to support an inference that he shared in the control of the

narcotic drug. Appellant was not an innocent bystander, but one without whose intrusion at its inception and subsequent participation the sale would have never occurred. Hernandez (supra at p. 124).

The fact of the appellant's deep involvement in the scheme to sell marijuana is in no way negated by the momentary concern displayed by co-defendants Sanderson and Trend. This concern was occasioned only by the unexpected appearance of Agent Morelli after Sanderson and Trend had earlier completed a sale of marijuana to him. It did not reflect that appellant could not assure the delivery of the marijuana for in fact the sale was consummated as arranged by appellant. Nor does the fact that Agent Morelli paid the co-defendants \$70.00 more than the agreed purchase price reflect that appellant could not assure delivery. Once again, a more accurate explanation is as Morelli testified, " . . . I had to think of a real quick story to explain how I ended up with another car, and I made an error in counting my money, I gave \$70.00 too much." [R. T. p. 149, lines 2-4]. Had it not been for the bizarre circumstances of the same agent purchasing marijuana twice in the same day from the same offenders the transaction would have been effected without the slightest inquiry exactly as arranged and anticipated by appellant.

Thus, applying the above facts which illustrate the appellant's control over the marijuana, to this Court's construction that the existence of a " . . . possible inference becomes a proper inference of the fact of possession . . . of dominion and control over the marijuana . . . and once made by the trier of fact, and

determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this court). " Williams v. United States, 290 F.2d 451 (9th Cir. 1951); Anthony v. United States, 331 F.2d 687 (9th Cir. 1964).

V

CONCLUSION

There appearing from the foregoing ample evidence to support the conviction, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVELYN R. MARKS,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

FILED

DEC 8 1967

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 81-84) are not officially reported.

JURISDICTION

The petition for review (I-R. 99-100) involves federal income taxes for the taxable years 1961, 1962, and 1963 in the respective amounts of \$410.15, \$390.06, and \$269.00. The taxpayer's income tax returns were timely filed and the notices of deficiency covering these taxes were mailed to the taxpayer by the Commissioner on April 29, 1964 (I-R. 8-12), and on December 2, 1964 (I-R. 19-21). Within ninety days after these dates, or on July 22, 1964 (I-R. 1-6),

and March 1, 1965 (I-R. 16-18), respectively, petitions by the taxpayer for a redetermination of the asserted deficiencies were filed in the Tax Court under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decisions of the Tax Court were entered June 2, 1966. (I-R. 97-98.) These cases are brought to this Court by a petition for review filed on August 5, 1966 (I-R. 99-100), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of the Code.

QUESTIONS PRESENTED

1. Whether taxpayer is entitled to any deduction from her gross income from other sources for the amounts she allegedly failed to earn, i.e., the amounts of anticipated earnings, because she was prevented from engaging in her former profession of teaching.

2. Whether taxpayer is immune from the obligation of paying federal income taxes because she allegedly has been arbitrarily deprived of certain rights and benefits which are supported by tax revenues.

3. Whether taxpayer is entitled to a deduction for education expenses allegedly incurred by her to obtain her teacher's license.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 1. TAX IMPOSED.

(a) Rates of Tax on Individuals.--A tax is hereby imposed for each taxable year on the taxable income of every individual other than a head of a household to whom subsection (b) applies

The amount of the tax shall be determined in accordance with the following table:

* * * * *

(26 U.S.C. 1958 ed., Sec. 1.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.162-5 Expenses for education.

* * * * *

(b) Nondeductible educational expenditures--(1) In general. Educational expenditures described in subparagraphs (2) and (3) of this paragraph are personal expenditures or constitute an inseparable aggregate of personal and capital expenditures and, therefore, are not deductible as ordinary and necessary business expenses even though the education may maintain or improve skills required by the individual in his employment or other trade or business or may meet the express requirements of the individual's employer or of applicable law or regulations.

(2) Minimum educational requirements. (i) The first category of nondeductible educational expenses within the scope of subparagraph (1) of this paragraph are expenditures made by an individual for education which is required of him in order to meet the minimum educational requirements for qualification in his employment or other trade or business. The minimum education necessary to qualify for a position or other trade or business must be determined from a consideration of such factors as the requirements of the employer, the applicable law and regulations, and the standards of the profession, trade, or business involved. The fact that an individual is already performing service in an employment status does not establish that he has met the minimum educational requirements for qualification in that employment. Once an individual has met the minimum educational requirements for qualification in his employment or other trade or business (as in effect when he enters the employment or trade or business), he shall be treated as continuing to meet those requirements even though they are changed.

* * * * *

(26 C.F.R., Sec. 1.162-5(b).)

STATEMENT

The Tax Court found the facts to be substantially as follows (I-R. 81-82):

The taxpayer filed her federal income tax returns for the taxable years 1961, 1962, and 1963 with the District Director of Internal Revenue at Los Angeles, California. In these returns, the first two of which were later amended, the taxpayer reported that she had total income of \$3,197.94 (I-R. 37), \$3,004.88 (I-R. 46), and \$2,150.61 (I-R. 49), respectively. The taxpayer then deducted the sum of \$3,498.06 in her 1961 amended income tax return (I-R. 38-39), \$3,667.12 in her 1962 amended income tax return (I-R. 47-48), and \$4,902.00 in her 1963 income tax return (I-R. 50-51), as allegedly representing the difference between her anticipated earnings from the use of teaching credentials had she been allowed to engage in her former profession of teaching and her actual earnings in those years (I-R. 82). These deductions eliminated altogether taxpayer's tax liability for the years in question. However, the Commissioner of Internal Revenue disallowed the same and issued notices of deficiency.

Upon the receipt of the notices of deficiency the taxpayer instituted proceedings in the Tax Court for a redetermination of the asserted deficiencies. (I-R. 1-6, 16-18.) After a trial on December 1965, the Tax Court on March 24, 1966, found in favor of the Commissioner on the grounds that there is no provision in the Internal Revenue Code that allows a taxpayer a deduction for loss of anticipated earnings, that one cannot avoid federal taxation as a form of self-regulated

redress, and that a constitutional question was not properly raised. (I-R. 81-84.) The taxpayer's request for a rehearing was denied by the Tax Court on March 31, 1966 (I-R. 86-88), and the Tax Court entered its formal decisions on June 2, 1966 (I-R. 97-98). On August 5, 1966, the taxpayer filed a petition for review by this Court. (I-R. 99-100.)

SUMMARY OF ARGUMENT

1. The first issue in this case involving the deductibility from gross income from other sources of alleged anticipated earnings which were not earned because of the happening of a certain event was before the Supreme Court in Hort v. Commissioner, 313 U.S. 28 (1941), where it was answered adversely to the taxpayer therein. That decision is controlling here.

2. With regard to the second issue, Section 1 of the Internal Revenue Code of 1954 imposes a tax "on the taxable income of every individual." The taxpayer has failed to meet the burden placed upon her to show that her income was exempt from taxation either under a provision of the Code or because the Code contravened a provision of the Federal Constitution.

3. The third issue was not raised below. Therefore, it is not properly before this Court. Even if the Court were to consider it, it is hornbook knowledge that a person may not deduct educational expenses incurred to acquire professional standing because these expenses are in the nature of personal expenses which are proscribed by Section 262 of the 1954 Code. Moreover, there is no evidence of

record here that such expenses were incurred or were incurred in the taxable years in question. The taxpayer has failed to meet the burden placed upon her to show that the Internal Revenue Code permits a deduction for educational expenses incurred to acquire professional standing.

ARGUMENT

I

THE TAX COURT CORRECTLY DETERMINED THAT THE TAXPAYER MAY NOT DEDUCT FROM HER GROSS INCOME FROM OTHER SOURCES ANTICIPATED INCOME SHE FAILED TO EARN AFTER ALLEGEDLY BEING DENIED THE RIGHT TO TEACH IN PUBLIC SCHOOLS IN CALIFORNIA

Here the taxpayer is seeking to deduct from her gross income from other sources amounts she allegedly failed to earn, i.e., amounts of anticipated earnings, because she was reputedly prevented from engaging in her former profession by reason of the cancellation of her license to teach. The issue thus raised is clearly controlled by the Supreme Court's decision in Hort v. Commissioner, 313 U.S. 275 (1941). The taxpayer in Hort wanted to deduct the difference between the amount that he could have earned from a lease had it not been cancelled and the amount that he received as consideration for its cancellation. The Court held that this was not permissible and said (pp. 32-33):

Undoubtedly * * * [the cancellation of the lease] diminished the amount of gross income petitioner expected to realize, but to that extent he was relieved of the duty to pay income tax. Nothing in § 23(e) [of the Revenue Act of 1932, now Section 165(c) of the Internal Revenue Code of

1954] indicates that Congress intended to allow petitioner to reduce ordinary income actually received and reported by the amount of income he failed to realize.

The taxpayer in this case is in the same position as was the lessor in Hort. In Hort, that taxpayer claimed to have suffered a property loss which resulted in a reduced income. However, this type of loss, as the Supreme Court pointed out, relieves the taxpayer from paying taxes on the amounts not earned, but does not give the taxpayer a deduction from earned income for the amounts not earned. The law with regard to such an attempted deduction has not been changed.

Thus, here the taxpayer was relieved of the duty of paying taxes to the extent that her anticipated gross income was diminished by her inability to engage in the teaching profession. But as the Tax Court correctly said below, "it is well settled that a taxpayer is not allowed to reduce ordinary income actually received by the amount of income he failed to realize." (I-R. 82.) See also Hutcheson v. Commissioner, 17 T.C. 14 (1951), and, Jones v. Commissioner, decided June 4, 1942 (P-H Memo B.T.A., par. 42,324).

II

THE TAXPAYER HAS FAILED TO SUSTAIN THE BURDEN
THAT RESTS UPON HER TO SHOW THAT HER INCOME
IS IMMUNE OR EXEMPT FROM TAXATION

Section 1 of the Internal Revenue Code of 1954, supra, imposes a tax "on the taxable income of every individual." It is a well-established principle of federal tax law that a deduction from gross income is a matter of legislative grace and that one who claims an exemption or a deduction under the Code "must be able to point to an

applicable statute and show that he comes within its terms." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Helvering v. Northwest Steel Mills, 311 U.S. 46, 49 (1942); and Weible v. United States, 244 F. 2d 158, 162 (C.A. 9th, 1957). The taxpayer has failed to point to any specific statute that would exempt her income from taxation and, indeed, we respectfully submit, none exists.

Rather, the taxpayer claims that the Internal Revenue Code of 1954 is unconstitutional as applied to her. She claims that the Code violates the Fourteenth Amendment. As pointed out by the Tax Court below, the Fourteenth Amendment is not applicable to the Federal Government but to the several states. (I-R. 83.) See also, Wight v. Davidson, 181 U.S. 371, 384 (1901); Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937); and Hess v. Mullaney, 213 F. 2d 635 644 (C.A. 9th, 1954), certiorari denied sub nom. Hess v. Dewey, 348 U.S. 836. Further, it is an axiom that to challenge the constitutionality of a particular section of any one of the revenue acts, one must set forth the specific constitutional provision alleged to be violated. See, Prather v. Commissioner, 322 F. 2d 931, 934 (C.A. 9th, 1963); United States v. Hayman, 342 U.S. 205, 223 (1952); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947); Federation of Labor v. McAdory, 325 U.S. 450, 461-462 (1945); Kitagaw v. Shipman, 54 F. 2d 313, 315 (C.A. 9th, 1931), certiorari denied, 286 U.S. 543 (1932); Dillon v. Commissioner, 20 B.T.A. 690 (1930); and 1 Mertens, Law of Federal Income Taxation (Rev.), Sec. 4.06. The taxpayer has failed to point out other than the inapplicable Fourteenth Amendment

the particular provision of the Constitution that the Internal Revenue Code allegedly violates.

Finally, the party attacking an Act of Congress has the burden of overcoming the presumption that the statute is constitutional and of clearly proving that the act is unconstitutional. See Madden v. Kentucky, 309 U.S. 83, 88 (1940); Borden's Co. v. Baldwin, 293 U.S. 194, 209 (1934); and Gorin v. United States, 111 F. 2d 712, 720-721 (C.A. 9th, 1940), affirmed, 312 U.S. 19 (1941), rehearing denied, 312 U.S. 713. Taxpayer has not presented one scintilla of evidence or logical reasoning to show that the Internal Revenue Code is unconstitutional. Clearly she has not sustained the heavy burden placed upon one who attacks the constitutionality of an Act of Congress.

Inasmuch as the taxpayer has failed to show in any wise that her income is exempt or immune from taxation, the Tax Court's decision should, we respectfully submit, be affirmed.

III

THE TAXPAYER FAILED TO RAISE THE ISSUE AS TO WHETHER A PERSON IS ENTITLED TO DEDUCT THE EXPENSES INCURRED TO ENTER A PROFESSION BEFORE THE TAX COURT NOR DID SHE INTRODUCE ANY EVIDENCE BEARING ON THE PROBLEM, AND, THEREFORE, SUCH ISSUE IS NOT PROPERLY BEFORE THIS COURT AT THIS TIME, BUT IF IT WERE, THE LAW IS CLEAR THAT SUCH EXPENSES ARE NOT DEDUCTIBLE

The taxpayer raises here for the first time the question of whether she should be allowed a deduction for purported expenses incurred to obtain her alleged teacher's license. Unless a party properly raises

an issue before the Tax Court, the appellate court will not ordinarily consider the issue on appeal. See Hormel v. Helvering, 312 U.S. 552 (1941); Helvering v. Tex-Penn Co., 300 U.S. 481, 498 (1937); Doric Co. v. Commissioner, 341 F. 2d 967, 972 (C.A. 9th, 1965); Vogel's Estate v. Commissioner, 278 F. 2d 548, 550 (C.A. 9th, 1960); and Commissioner v. Belridge Oil Co., 267 F. 2d 291 (C.A. 9th, 1959). Where no new findings of fact were necessary, this Court in MacRae v. Commissioner, 294 F. 2d 56 (1961), permitted the taxpayer to raise an alternative ground to support his claim. However, it is the Commissioner's contention that the ground attempted to be raised by the taxpayer here to support her deduction has no factual foundation of record in this case; and, even with a factual foundation, such ground is clearly without merit. Inasmuch as the record is devoid of any proof that the taxpayer incurred such expenses or that they were incurred in the taxable years in question and inasmuch as such facts would have to be present to even begin to support the taxpayer's claim, the case of MacRae, supra, is not applicable. Therefore, since this contention of taxpayer was not raised below, we respectfully submit that it should not be considered here at this time.

However, if the Court should feel that this contention should be considered, it is the Commissioner's position that it is entirely without merit. The cost of entering a profession is a personal expense the deduction of which is not allowable under the direct proscription of Section 262 of the Internal Revenue Code of 1954, supra. See also Treasury Regulations on Income Tax (1954 Code), Sec. 1.162-5(b), supra; Greenberg v. Commissioner, 367 F. 2d 663 (C.A. 1st, 1966); and

4A Mertens, Law of Federal Income Taxation (Rev.), Sec. 25.122.

Further, as is pointed out above, the burden is upon the taxpayer to show that the deduction of her purported expenses is allowable.

Again, she has failed to sustain this burden.

CONCLUSION

For the reasons given above, the Tax Court's decision should be affirmed.

Respectfully submitted,

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DECEMBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of December, 1967.

David English Carmack, Attorney



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR M. ELLIS,

Appellant,

vs.

No. 21332 ✓

C. J. FITZHARRIS, Superintendent,
Correctional Training Facility,
Soledad, California, et al.,

Appellees.

APPELLEE'S BRIEF

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Appellees.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was apparently invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts.

On December 20, 1946, appellant and one John C. Defer were convicted of murder in the first degree, appellant was also adjudged to have suffered two prior convictions. Appellant was sentenced to imprisonment in the State Prison for the term of his natural life. (TR 20, 35).^{1/} There was no appeal from the judgment of conviction but, represented by the same attorney who represented him at trial, appellant did take an appeal from an order of the trial court refusing to correct the record relating to the recordation of the jury verdicts. (TR 20). Thereafter, appellant filed petitions for habeas corpus in the Monterey County Superior Court on April 2, 1964, the District Court of Appeal for the State of California, First Appellate District on December 22, 1964, and in the California Supreme Court on or about February 17, 1965 (TR 3-4). The petitions were all denied (TR 4: AOB 1-2).

B. Proceedings in the Federal Courts.

On or about February 12, 1964, application was made to the United States District Court, Northern District of California for leave to file a petition for writ of habeas corpus. This application was denied on the ground

1. 'TR' refers to the transcript of record on the proceedings in the District Court.

that petitioner had not exhausted his state remedies (TR 3-4; AOB 1-2). The instant petition was filed on April 20, 1965 (TR 1; AOB 2).

On June 30, 1965, the Honorable William T. Sweigert, Judge of the United States District Court, issued an order to show cause why a writ of habeas corpus should not be issued (TR 17). The Attorney General's office, representing the respondent herein, filed a return to said order on September 17, 1965 (TR 19-34). Petitioner filed his traverse on October 6, 1965 (TR 36-41).

Judge Sweigert issued an interim order on January 12, 1966, inviting petitioner to file a supplemental memorandum in regards the voluntariness issue which was raised in his petition (TR 42-46). Petitioner filed said supplemental memorandum on March 31, 1966 (TR 47-53).

On August 3, 1966, Judge Sweigert denied the petition, discharged the order to show cause and dismissed the proceedings (TR 54-65).

On September 1, 1966, Judge Sweigert granted petitioner's application for a certificate of probable cause (TR 66). Notice of appeal had been filed on August 29, 1966 (TR 68).

APPELLANT'S CONTENTIONS

1. That the court below erred in its determination that the procedural safeguards for the admissibility

of confessions was followed.

2. That the court below erred in its determination that an evidentiary hearing should not be held to determine whether or not the confession was voluntary.

SUMMARY OF APPELLEES' ARGUMENT

I. The decision of the District Court that the complaint of confession was voluntary, based as it was, upon a review of the exhaustive trial proceedings in that regard, must stand, as appellant has failed to show error.

II. The standards of Townsend v. Sain having been met in the instant case, there was no error when the District Court declined to order an evidentiary hearing.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT THAT THE COMPLAINED OF CONFESSION WAS VOLUNTARY, BASED AS IT WAS, UPON A REVIEW OF THE EXHAUSTIVE TRIAL PROCEEDINGS IN THAT REGARD, MUST STAND, AS APPELLANT HAS FAILED TO SHOW ERROR.

Appellant's first contention on this appeal is that "The Court below erred in its determination that the procedural safeguards for the admissibility of confessions was followed." (AOB 4). However, he fails to state in what manner the court so erred. In his argument (AOB 5-9), appellant chooses to attack the evidence which was before the District Court, and not that Court's adjudication



thereof in its capacity as finder of fact. The argument presented herein is exactly the same (although much abbreviated) as the argument petitioner urged before the District Court, as shown by the petition, traverse, and supplemental memorandum on file. It may have been proper there, but it is improper here.

The sole question on this appeal is the propriety of the District Court's decision predicated, as it is, upon a determination of the issues of law raised by the pleadings, said issues being based upon the uncontested transcript of the trial which resulted in the judgment which is currently being collaterally attacked.

The initial issues raised by the instant petition concerned the alleged inadmissibility of petitioner's confession based upon Escobedo and voluntariness grounds (TR 1-16). The Carrizosa decision (predecessor of Johnson v. New Jersey) disposed of petitioner's Escobedo argument, and on January 12, 1966, the District Court issued an interim order wherein the court asked petitioner for additional argument on the voluntariness issue (TR 42-46). In his supplemental memorandum, petitioner vigorously argued that the standards of Townsend v. Sain, 372 U.S. 293 (1963) and Jackson v. Denno, 378 U.S. 368 (1964), had not been met and that the confession was thereby inadmissible (TR 47-53).

In all his pleadings and memoranda, petitioner relied upon the trial transcript.

The District Court, in this case, did not confine itself to the pleadings and memoranda in making the decision which is the basis of this appeal. Judge Sweigert obtained and carefully studied a copy of the trial transcript wherein is reflected the extensive and exhaustive litigation which occurred relative to the admission into evidence of the confession which is the subject of the instant petition (TR 55). Appellant does not contest the accuracy of this transcript. The only "new" evidence offered by appellant which was not reflected by the transcript is an affidavit, signed by petitioner's parents, that while petitioner was being interrogated, they could not visit him, nor would petitioner be allowed to see an attorney (TR 68). This affidavit was, of course, also before the District Court.

After a review of the arguments presented, and being fully apprised of the facts and circumstances surrounding the taking of the confession and its admission into evidence (TR 54-59), the District Court made the following findings:

(1) The trial judge did make an independent determination of the admissibility of the confession as required by Jackson v. Denno (TR 59-60).

This finding is supported by the trial transcript which shows that while initially the trial judge thought that the determination of voluntariness was exclusively the province of the jury (RT 275-76; TP 55), he subsequently realized his error and acknowledged that he did first have the duty to determine the voluntariness issue (PT 321, 325, 350; TR 55). The court thereupon made an independent determination of petitioner's co-defendant's confession (RT 391-92; TR 55-56). With regard to petitioner's confession, petitioner was placed on the stand, during the presentation of the State's case, specifically for the purpose of testifying that the confession was not freely and voluntarily given (RT 438-456; TR 56-57). Much of petitioner's testimony was contradicted by those involved (RT 233-243, 258-260, 271, 311-312, 323, 337-38, 484-488; TP 57-59). At the close of all the evidence presented on the voluntariness issue, the proposed admission of the confession was objected to by petitioner's counsel. The court overruled the objection and also overruled the subsequent objections made during and after the confession was read (RT 494-495, 539, 541; TR 59).

This uncontested evidence clearly supports the District Court's finding that the trial judge did make an independent determination of the admissibility of the confession.

(2) The fact finding procedure employed by the trial court was adequate to afford a full and fair hearing on the question of voluntariness (TR 60).

This finding is supported by the transcript which shows that the trial judge permitted the defense to introduce all evidence relative to voluntariness during the presentation of the State's case and prior to the judge's ruling on the admissibility of the evidence (TR 59-60).

(3) When judged against the standards of Townsend v. Sain, 372 U.S. 293, 316 (1963), the trial court's determination on the issue of voluntariness is fairly supported by the record (TR 60-65).

This finding is amply substantiated by the transcript when viewed according to the rules applicable to collateral review of evidence in these matters. As the District Court pointed out in its order, the court must, in making this determination, consider only the uncontested portions of the record (TR 61). Culombe v. Connecticut, 367 U.S. 568 (1961).

The uncontested portions of the instant records show that petitioner had been questioned intermittently for approximately six hours on September 3, 1946, and for approximately ten hours on the following day (TR 61). However, he did not then make a statement. When petitioner heard his



co-defendant's confession (found to be voluntary) and went back to his city prison cell for the night to think about it he decided to confess. It was only after this night's rest and reflection - reflection upon his co-defendant's implicating confession - that petitioner decided to make a statement (TR 61-62).

Based upon these facts and upon a review of applicable case law (TR 62-64), the District Court found (TR 65) that the confession was not the product of coercion and that the record fairly supports that finding.

These findings by the District Court cannot be overturned unless they are clearly erroneous. Fed.R.Civ.P. 52(a); United States ex rel. Gates v. Pate, 355 F.2d 879, 881 (7th Cir. 1966); Kelly v. Johnston, 128 F.2d 793, 794 (9th Cir. 1942). Appellant has not shown how the District Court erred. All of the federal cases cited by appellant in his re-argument of the voluntariness issue (AOB 8) were considered, and distinguished by the District Court, as reflected by its order (TR 62-65). The procedure followed by the District Court in making this determination is judicially sanctioned. Culombe v. Connecticut, supra, 367 U.S. 568 (1961) (TR 60-61), and appellant does not dispute its correctness.

Indeed the determination of voluntariness by this

District Court finds support in many cases, in this Circuit and others, and they command an affirmance in this case. See Palakiko v. Harper, 209 F.2d 75, 89 (9th Cir. 1953); Barber v. Gladden, 327 F.2d 101-103-104 (9th Cir. 1964); United States ex rel. Crump v. Sain, 295 F.2d 699 (7th Cir. 1961); Lattin v. Cox, 355 F.2d 397, 399-400 (10th Cir. 1966); United States ex rel. Russo v. State of New Jersey, 351 F.2d 429, 433 (3d Cir. 1965); Smith v. Heard, 315 F.2d 692, 694 (5th Cir. 1963).

II

THE STANDARDS OF TOWNSEND V. SAIN HAVING BEEN MET IN THE INSTANT CASE, THERE WAS NO ERROR WHEN THE DISTRICT COURT DECLINED TO ORDER AN EVIDENTIARY HEARING.

The secondary issue on this appeal is whether the District Court erred in failing to order an evidentiary hearing (AOB 4, 9-10). The standards to be followed in making this determination are set forth in Townsend v. Sain, 372 U.S. 293 (1963). The rule is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if: (1) the merits of the factual dispute were not resolved in these state hearings; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair

hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearings; or, (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313.

Since the District Court found, specifically, that the merits of the factual dispute as to voluntariness were resolved at the state hearing, that the fact finding procedure was adequate to insure a full and fair hearing, and that the finding of voluntariness was adequately supported by the record, the only standard of Townsend left upon which petitioner may ground his plea for a hearing is that there is a substantial allegation of newly discovered evidence (TR 54-55). Townsend v. Sain, supra, page 313.

The "new" evidence put forth by petitioner was more than a mere allegation. He caused to be submitted to the District Court as an exhibit attached to his petition (TR 6-8) an affidavit of petitioner's mother to the effect that petitioner's parents were not allowed to visit him while he was being interrogated nor would they allow petitioner to see an attorney. While we doubt that this is "substantial" new evidence on the question of voluntariness,

the point remains that the affidavit is complete in and of itself and that it was considered by the District Court below. There is no suggestion that there is any other previously unheard of evidence which can only come to light in an evidentiary hearing. We think it quite apparent that the District Court had before it all of the evidence which might possibly exist in this matter, and that nothing would be unearthed in a hearing which has not already been presented. Petitioner has not averred otherwise. For this reason and for the further, most important reason that Townsend v. Sain has been complied with, we submit that there was no error committed by the District Court in not ordering an evidentiary hearing.^{2/}

2. In this regard, we would draw the Court's attention to the recent adoption of 28 U.S.C. § 2254(d). This section provides that in a federal habeas corpus case, the state court findings are presumed to be correct, except where certain enumerated circumstances are present.

The purpose of this amendment is to afford finality to state court decisions which result from a fair hearing and which are fairly supported by the record. The drafters of the amendment verbalized this intent by stating that its purpose was to give a "qualified application of the doctrine of res judicata" to federal habeas corpus proceedings brought by state prisoners. H.R.Rep. No. 1892, 89th Cong., 2d Sess. 15 (1966). Furthermore, under this amendment, there is an increased burden of proof - "convincing evidence" - imposed upon the applicant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

DATED: January 26, 1967

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of the State of California

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The decision of the District Court, clearly correct under then existing law, finds further support in this statute, for, even if this judgment were reversed, subsequent proceedings would be governed by 28 U.S.C. § 2254(d), and, since none of the excepting circumstances are present, the findings of the state court would be entitled to a presumption of correctness.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

DATED: January 26, 1967

THOMAS C. LYNCH, Attorney General
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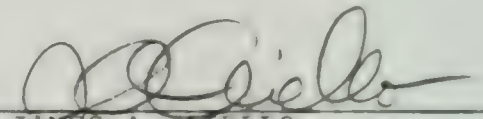
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The decision of the District Court, clearly correct under then existing law, finds further support in this statute, for, even if this judgment were reversed, subsequent proceedings would be governed by 28 U.S.C. § 2254(d), and, since none of the excepting circumstances are present, the findings of the state court would be entitled to a presumption of correctness.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: January 26, 1967

A handwritten signature in dark ink, appearing to read "J. Aiello", is written over a horizontal line.

JAMES A. AIELLO

Deputy Attorney General
of the State of California



**In the United States Court of Appeals
for the Ninth Circuit**

TRI VALLEY GROWERS, formerly known as TRI-VALLEY PACK-
ING ASSOCIATION, a corporation, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL
TRADE COMMISSION ISSUED FOLLOWING REMAND

**SUPPLEMENTAL BRIEF AND APPENDIX
FOR RESPONDENT**

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W. B. LUCK, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,337

**TRI VALLEY GROWERS, formerly known as TRI-VALLEY PACK-
ING ASSOCIATION, a corporation, PETITIONER**

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*ON PETITION TO REVIEW AN ORDER OF THE FEDERAL
TRADE COMMISSION ISSUED FOLLOWING REMAND*

SUPPLEMENTAL BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES

1. Whether the Commission, consistent with the remand directed by this Court in the prior review proceedings in No. 18,125, properly determined that the lower prices quoted by Tri Valley to certain favored purchasers were not in fact available to the unfavored purchasers as required by Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a).

2. Whether the Commission, consistent with the remand directed by this Court in No. 18,125, properly determined that petitioner has failed to show that its lower prices were meaning of Section 2(b) of the Clayton Act, as amended, made to meet equally low prices of competitors within the 15 U.S.C. § 13(b).

3. Whether the Commission, consistent not only with the remand directed by this Court in No. 18,125, but also the

decision of the Supreme Court in the related case of *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case (No. 18,903), properly determined that Tri Valley has violated Section 2(d) of the Clayton Act, as amended, 15 U.S.C. § 13(d).

4. Whether the Commission's present cease and desist order, with the modification proposed below in light of the more recent decision of the Supreme Court in the related case of *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case (No. 18,903), is reasonably related to the violations of law found to exist.

Upon the conclusion of the remand proceedings directed by this Court in No. 18,125, the Commission issued a cease and desist order which is somewhat narrower with respect to the Section 2(d) violations than the order against Tri Valley previously before the Court. Following the issuance of the present order and after the filing of the record herein, the Supreme Court issued its opinion in *Fred Meyer* and this Court thereafter issued its Modified Final Decree in that case. As the Commission has been without jurisdiction to modify its present order in conformity with that decision and this Court's Modified Final Decree in *Fred Meyer* because of the prior filing of the record herein, the Commission proposes that this Court modify paragraph 2 of the present order (by adding thereto certain language shown below in italics) so as to read as follows:

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers of respondent, *includ-*

ing customers who do not purchase directly from respondent, who compete in the distribution of such products with the favored customer.

The Commission has answered petitioner's contentions as to the asserted impropriety of the conduct of the administrative proceedings held after remand but believes such contentions to be entirely without substance and to present no issues for consideration by this Court.

COUNTERSTATEMENT OF THE CASE

The Nature Of The Case

This matter arises on a petition for review of an order to cease and desist issued by respondent, the Federal Trade Commission, against petitioner, Tri Valley Growers, a corporation (formerly known as Tri-Valley Packing Association), hereinafter referred to as "Tri Valley." The order was issued following the holding of the remand proceedings directed by this Court in disposing of an earlier petition for review filed by petitioner in *Tri-Valley Packing Association v. Federal Trade Commission*, 9th Cir. No. 18,125.

The Commission's order challenged here, which is narrower in certain respects than the prior order set aside by the Court in No. 18,125, again directs Tri Valley to cease and desist from engaging in certain practices found by the Commission to be violative of Sections 2(a) and 2(d) of the Clayton Act, as amended, 15 U.S.C. §§ 13(a) and 13(d).¹ The practices proscribed involve Tri Valley's discrimination in prices and advertising allowances between competing buyers of its canned goods of like grade and quality.

The Court's opinion in the prior review proceedings in

¹ The pertinent provisions of the amended Clayton Act are set forth at pp. 2-3 of the original brief filed by the Commission in the review proceedings held prior to the remand directed by this Court in *Tri-Valley Packing Association v. Federal Trade Commission*, No. 18,125. The respective jurisdictions of this Court and the Commission are noted at pp. 1-2 of that brief.

No. 18,125 is reported, *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d 694 (9th Cir. 1964). There, this Court, while deciding numerous matters in the Commission's favor, remanded the case for further proceedings, stating in part (329 F.2d at 710):

Any judicial review following the entry of the Commission's orders resulting from proceedings on remand may be upon the present record and briefs as appropriately supplemented.

The record herein reflects the proceedings held both before and after the remand directed by the Court.² Accordingly, and as permitted under the above-quoted direction of the Court, the instant brief is intended as a supplement to the brief which the Commission originally filed in No. 18,125.

The pleadings and the Commission's proceedings prior to remand

The two complaints issued by the Commission against petitioner Tri Valley (respondent in the Commission proceedings) and certain other pertinent pleadings in the consolidated adjudicative proceedings challenged here are described, together with record references, at pp. 1, 3-6 of the Commission's brief in No. 18,125.³

In general, the first complaint (issued in Docket No.

² The proceedings of the Commission held *prior* to remand are contained at pp. 1-1560 of the reproduced transcript of record, while those held *subsequent* to the remand are contained at pp. 1561-2639. The entire record has been reproduced in 28 volumes, the first 18 volumes containing pp. 1-1560 (the proceedings prior to remand) and the remaining ten volumes containing pp. 1561-2639 (the proceedings subsequent to remand). Therefore, the references to the record in the Commission's brief in the prior review proceedings in No. 18,125 apply equally to the consolidated record filed in the instant proceedings of this Court. See the further explanation made in footnote 4, *infra*, of this brief with respect to the manner of reference by the Commission to the consolidated record.

³ See also *In the Matter of Tri-Valley Packing Association*, 60 F.T.C. 1134 (1962), wherein the two complaints are set forth verbatim (at pp. 1134-1138).

7225) charges Tri Valley with violating Section 2(a) of the amended Clayton Act, 15 U.S.C. § 13(a), by discriminating in price between different purchasers of its products by selling these products to some of its purchasers at higher prices than it sells its products of like grade and quality to other purchasers who compete with the unfavored purchasers or with customers of the unfavored purchasers in the resale of such products. The complaint further alleges, *inter alia*, that the effect of such discriminatory practices may be to injure, destroy or prevent competition with the favored purchasers.

The second complaint (issued in Docket No. 7496) charges Tri Valley with violating Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), by paying advertising and promotional allowances to some customers without making such allowances available on proportionally equal terms to all other customers competing in the distribution of Tri Valley's products.

The evidence of record in the consolidated proceedings and the Commission's findings and conclusions thereon *prior to remand* are detailed at pp. 6-24 of the Commission's brief in No. 18,125. A number of these same matters are also summarized in the Court's opinion in the prior review proceedings, *Tri-Valley Packing Association v. Federal Trade Commission*, *supra*.

The first order entered by the Commission directed Tri Valley to cease and desist from engaging in certain practices violative of Sections 2(a) and 2(d) of the amended Clayton Act. R. VI, 578.⁴ As shown *infra*, the present order of the Commission which Tri Valley now challenges,

⁴ In this supplemental brief as well as in the Commission's previously filed brief in No. 18,125, the Commission refers to the record before the Court in the following manner: "R." indicates the reproduced transcript of record. The Roman numerals indicate the volume, the Arabic numerals the pagination. This implements the explanation set forth in this brief in footnote 2, *supra*, respecting the nature of the consolidated record herein. See also the Commission's first brief in No. 18,125 at p. 1, n. 2. It should also be noted that the page numbers of the record which are referred to in this and the prior brief are found in that record in *red* at the bottom of each page.

while similar, contains certain limiting language not found in the prior order.

The prior review proceedings of this Court in No. 18,125

On appeal to this Court in No. 18,125, the Commission's prior order was reversed and the cause was remanded for further proceedings in accordance with the Court's opinion, *Tri-Valley Packing Association v. Federal Trade Commission*, *supra*. Although ruling in favor of the Commission with respect to a number of matters, the Court in its opinion set aside the Commission's findings and conclusions on the Section 2(d) charge and set aside the order of the Commission on both the Section 2(a) and Section 2(d) charges.⁵ 329 F.2d at 710; see also R. XXIV, 2148 n. 1.

In so remanding, the Court in its opinion directed the Commission to undertake further findings or consideration on three points. As summarized by the Commission in its opinion, the three points are (R. XXIV, 2148-49):

(1) Whether or not a causal link existed between the seller's prices and the impact on customer competition, or more specifically, whether the goods were generally available in the so-called "California Street" market so that in turn a determination can be made on whether the injury was due to the price discrimination rather than the failure of the disfavored purchasers to take advantage of the opportunity to buy . . .; (2) the threshold issue of whether the prices allegedly met were competitive prices within the contemplation of the Section 2(b) proviso . . ., and (3) the question of the existence of evidence or sufficiency of such evidence as may exist in the record to support the Section 2(d), Clayton Act charge

⁵ The original findings and conclusions issued by the Commission in connection with its first order are found at R. VI, 572-78; see also 60 F.T.C. at 1178-83. These findings, conclusions and order, however, are no longer pertinent for consideration in view of the issuance of new findings, conclusions and order by the Commission at the conclusion of the remand proceedings.

The Court's opinion did not prescribe the type of proceedings to be conducted in determining these questions, specify the further evidence which could be adduced, or limit the exercise of the Commission's discretion in reasonably carrying out the Court's directions.

The proceedings on remand before the Commission and its hearing examiner

Following this Court's disposition of the review proceedings in No. 18,125, the Commission, by its order of July 6, 1964, reopened the matter, remanded it to a hearing examiner "for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court," and directed the hearing examiner, upon completion of the further proceedings, to "file a revised initial decision based upon the record made prior to the remand and any additional evidence that may be received." R. XIX, 1561.

Thereafter, extensive prehearing conferences and related proceedings were held by the hearing examiner before scheduling further evidentiary hearings on remand. R. XIX, 1562-1675; R. XX, 1676-1732. In the evidentiary hearings on remand which commenced on January 27, 1965, additional documentary evidence was received and the testimony of fifteen witnesses for the Commission and one witness for Tri Valley was adduced. R. XXV, 2204-71; R. XXVI, 2272-2378; R. XXVII, 2379-2506; R. XXVIII, 2507-2639. Several of the witnesses had previously testified in the hearings held before remand. After the parties had rested their respective cases, the hearing examiner on February 3, 1965, closed the remand proceedings for the taking of testimony and reception of evidence. R. XX, 1733; R. XXVIII, 2634, 2635, 2639. The parties then submitted proposed findings and conclusions and supporting argument (R. XX, 1734-95; R. XXI, 1800-29, 1835-66).

Thereafter, the hearing examiner on April 15, 1965, issued his Initial Decision on remand, sustaining the Commission's charges that petitioner has violated Sections

2(a) and 2(d) of the amended Clayton Act, and he included in his initial decision an order to cease and desist. The decision contains detailed findings of fact and conclusions of law, together with specific references to the supporting testimony and exhibits in the record of the consolidated administrative proceedings before and after remand. (R. XXII, 1876-1935).⁶

Tri Valley noted its intention to appeal (R. XXII, 1937) and thereafter briefs were filed by the respective parties (R. XXIII, 1949-2012, 2015-64; R. XXIV, 2066-89), and oral argument was heard by the full Commission (R. XXIII, 2065; R. XXIV, 2090-2144).

On July 28, 1966, the Commission (with one of its members dissenting) issued a final order, together with an opinion, denying the appeal and adopting with certain modifications the initial decision on remand of the hearing examiner as the decision of the Commission (R. XXIV, 2145-68).⁷

The Commission's decision

The extensive findings of fact contained in the modified initial decision adopted by the Commission, and the questions raised with respect to them on this appeal, may be briefly summarized as follows:

First, the Commission found that Tri Valley discriminated in price between different purchasers (R. XXII, 1884-91; R. XXIV, 2149-50, 2168). A similar finding by the Commission in its original decision was affirmed by the Court, 329 F.2d at 700-702. The present finding rests upon the same evidence of discriminatory transactions considered by the Court in No. 18,125 and also upon additional discriminatory transactions found by the Commission. Tri Valley does not question the finding that it has discriminated in price between different purchasers, but does ques-

⁶ A typographical error in the Initial Decision was duly corrected on April 23, 1965. R. XXII, 1876.

⁷ Commissioner Elman, who dissented, filed a separate opinion (R. XXIV, 2169-81).

tion the Commission's authority in the remand proceedings to make additional findings of price discriminations (pet. supp. br. pp. 17, 30-31). We answer petitioner's argument below at pp. 14-17, 34 n. 32.

Second, the Commission found that the effect of the discrimination may be to substantially lessen competition or to injure competition with the favored purchasers (R. XXII, 1891; R. XXIV, 2151). A similar finding by the Commission in its first decision was also affirmed by the Court in its prior decision, 329 F.2d at 702-703. Tri Valley does not question this finding, except that it does question the Commission's authority to incorporate new findings of price discriminations not contained in the previous decision reviewed by the Court (pet. supp. br. pp. 17, 30-31). We answer this argument below at pp. 14-17, 34 n. 32.

Third, the Commission found that the lower prices were not available to the unfavored purchasers (R. XXII, 1891-94; R. XXIV, 2151-58). This finding, which is responsive to the first issue which the Court directed the Commission to consider on remand, is discussed below at pp. 17-25.

Fourth, the Commission found that Tri Valley failed to meet its burden under the good faith meeting of competition defense provided by Section 2(b) of the amended Clayton Act, 15 U.S.C. § 13(b) (R. XXII, 1894-98; R. XXIV, 2159-2163). This finding, which is responsive to the second issue which the Court directed the Commission to consider on remand, is discussed below at pp. 25-31.

Fifth, the Commission found that Tri Valley did not grant or offer promotion payments or allowances on proportionally equal terms to all customers competing in the distribution of Tri Valley's products (R. XXII, 1898-1903; R. XXIV, 2164-67) as required by Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d). This finding, which is responsive to the third and final issue which the Court directed the Commission to consider on remand, is discussed below at pp. 31-38.

Based upon the findings summarized briefly above, the Commission issued an order to cease and desist. The order is identical to that issued by the hearing examiner, except

for the addition of certain limiting language in paragraph two, *viz.*, the phrase "pursuant to a specially tailored or negotiated arrangement." R. XXIV, 2146-47. The reasons for the inclusion of this phrase are discussed in the Commission's separate opinion, R. XXIV, 2167. See also Point V of the Argument, *infra*.

The Commission's order on remand likewise differs from the broader order to cease and desist entered by the Commission *prior* to remand since the first order did not include this limitation.⁸ Compare R. VI, 578.

On September 6, 1966, Tri Valley filed its petition for reconsideration of the Commission's decision, alleging that the decision raised new questions which Tri Valley had no opportunity to argue (R. XXV, 2182-97). After counsel supporting the Commission's complaint filed an answer in opposition (R. XXV, 2198-2201), the Commission (with Commissioner Elman dissenting) denied the petition on September 23, 1966, in an order setting forth both its ruling and supporting views (R. XXV, 2202-03).

The pertinency to the instant case of the decision of the Supreme Court and the Modified Final Decree of this Court in *Fred Meyer*

In the prior proceedings in No. 18,125, this Court ruled, *inter alia*, that Section 2(d) of the Clayton Act, as amended, does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.*, if one is a wholesaler and the other a retailer. *Tri-Valley Packing Association v. Federal Trade Commission*, *supra*, 329 F.2d at 709. This particular question as to the scope of Section 2(d) had not been decided by the Commission in the Com-

⁸ The Commission's prior order also referred to the petitioner herein (respondent in the Commission proceedings) as Tri-Valley Packing Association while the orders on remand entered by the Commission and its hearing examiner refer to petitioner by its present name, Tri Valley Growers. By stipulation, the complaint issued by the Commission in this cause has been amended to incorporate this change of name (R. XXVII, 2397-98). "This change of name," as petitioner herein confirms (supp. br. p. 1 n. 1), "does not in any way affect the matters before the Court for decision."

mission proceedings held prior to remand, since the Commission viewed the case as involving customers competing on the same functional level (see R. VI, 572-587). Disagreeing with the Commission, this Court in No. 18,125 concluded that different functional levels were involved as to some of the favored and disfavored buyers and found it necessary to reach the question which the Commission had not considered and which, consequently, had not been briefed or argued by the Commission in this Court.

A year prior to this Court's decision in *Tri-Valley*, however, the Commission had squarely decided this question in a related proceeding styled *In the Matter of Fred Meyer, Inc.*, Docket No. 7492, 63 F.T.C. —, Trade Reg. Rep. [1961-1963 Transfer Binder] ¶ 16,368 (FTC 1963). The cease and desist order entered by the Commission in *Fred Meyer*, including the issue of the Commission's construction of Section 2(d), was awaiting review in this Court in the case of *Fred Meyer, Inc. v. Federal Trade Commission*, No. 18,903, at the time of the briefing, argument and decision in the *Tri-Valley* case, No. 18,125. Further, the *Fred Meyer* case involved, among other things, the same transactions under review in this case respecting Tri Valley and Fred Meyer, Inc. This Court, however, declined in *Fred Meyer* to reconsider its ruling in *Tri-Valley* with respect to the Section 2(d) question, explaining in part that "the issue was considered and considered at length" and "we are not inclined after so short a time to re-examine that decision . . ." *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 363 (9th Cir. 1966).

On the appeal of this Court's decision in *Fred Meyer*, the Supreme Court reversed the judgment of this Court, "insofar as it held that the promotional allowances granted Meyer by Tri-Valley and Idaho Canning did not violate § 2(d)," and remanded the case for further proceedings, consistent with the former's opinion. *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968). As the Supreme Court stated in part (390 U.S. at 357):

We conclude that the most reasonable construction of § 2(d) is one which places on the supplier the respon-

sibility for making promotional allowances available to those resellers who compete directly with the favored buyer.

And, further (390 U.S. at 358):

We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available to those who buy his products through wholesalers and compete with the direct buyer in resales.

In compliance with the remand directed by the Supreme Court and, in turn, this Court, the Commission on June 13, 1968, issued a modified order to cease and desist in its *Fred Meyer* proceeding consistent with the Supreme Court's construction of Section 2(d). On October 8, 1968, this Court issued a Modified Final Decree in No. 18,903, affirming and enforcing the latter order of the Commission. The decree is reproduced in the Appendix to this brief.

In the memoranda supporting several of Tri Valley's motions for extensions of time to file its supplemental brief herein, Tri Valley has advised the Court of the pertinency in the instant case of the issue as to Section 2(d) presented the Supreme Court for review in *Fred Meyer*. See petitioner's motion papers dated September 8, 1967, October 2, 1967, December 13, 1967, March 14, 1968, and April 17, 1968. In noting the question under review by the Supreme Court in *Fred Meyer*, Tri Valley twice informed this Court in part as follows:

The grant of this writ [of certiorari] was limited to the following question or issue:

"1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act."

The question to be so reviewed by the Supreme Court in *Meyer* is closely related to some of the Section 2(d) issues involved in petitioner's present petition, and a

decision thereon will in large part depend on the Supreme Court's construction of said Section. [P. 2 of each of the "Points And Authorities In Support Of Motion," which accompanied the respective motions of Tri Valley dated October 2 and December 13, 1967.]

Further, Tri Valley in its motion dated March 14, 1968, again sought to defer the filing of its supplemental brief until after the Supreme Court rendered its decision in *Fred Meyer*. Incorporating by reference the points and authorities filed in support of its motion of December 13, 1967, Tri Valley advised the Court in its motion of March 14, 1968, in part as follows:

This motion is made on the ground that in the considered opinion of the parties the decision of the Supreme Court in said cause [*Fred Meyer*] can be dispositive of a number of the issues in this case. . . .

In its subsequent application dated April 17, 1968, Tri Valley advised this Court of a need for additional time to file its brief in view of the Supreme Court's decision in *Fred Meyer* on March 18, 1968.

Although Tri Valley's supplemental brief fails to discuss the Section 2(d) issues in the light of the Supreme Court's decision in *Fred Meyer*, Tri Valley through its counsel thereafter authorized the Commission's counsel to represent Tri Valley's view that the Court should consider on this appeal the effect of the latter decision as well as the aforesaid modified order of the Commission to cease and desist as recently affirmed and enforced by this Court's Modified Final Decree in No. 18,903. See p. 6 of the affidavit supporting the Commission's motion herein dated October 24, 1968, and p. 5 of the affidavit supporting the latter's motion herein dated August 1, 1968.

In the circumstances, the Section 2(d) issues merit consideration on this appeal in the light of the Supreme Court's opinion in *Fred Meyer* and the Commission's modified order to cease and desist as affirmed and enforced by the Modified Final Decree entered by this Court in No. 18,903. In this

connection, the Commission requests the Court to modify further the present cease and desist order in conformity with the Supreme Court's decision and this Court's Modified Final Decree in the *Fred Meyer* case. The further modification requested is set forth and further discussed under point V of the argument which follows.

ARGUMENT

I. The Commission properly adduced additional evidence and made additional findings with respect to the issues which were remanded for further proceedings.

A general objection which Tri Valley raises with respect to the Commission's present findings is that in receiving additional evidence on remand and in considering such evidence, the Commission acted inconsistently with the remand ordered by this Court (pet. supp. br. pp. 10-11, 16, 17-20). This objection is premised largely upon an erroneous view of the Commission's functions in connection with the "further proceedings" directed by this Court.

In view of the complexity of the matter and the extensiveness of the administrative record, it was patently reasonable for the Commission on remand to direct the hearing examiner to conduct such further proceedings as would seem appropriate to facilitate the determinations desired by the Court and to submit a new Initial Decision at the conclusion of those proceedings. Nor is there any impropriety in the fact that many of the findings contained in the Initial Decision (on remand) are essentially a recapitulation of findings made previously by the Commission and affirmed by this Court in the prior review proceedings. 329 F.2d at 700, 701-02. We know of no authority—and none is cited by Tri Valley—precluding further discussion and recapitulation of findings in a subsequent administrative decision so long as they are not in conflict with the Court's mandate.

We submit that all of the findings adopted by the Commission are entirely consistent with the law of the case as

expressed by this Court in its opinion.⁹ These findings were duly considered "in relation to the opinion of the court, and any discriminatory transactions enumerated are either those referred to by the court, or additional transactions consistent with the concepts of the Court of Appeals in entering its remand order." R. XXII, 1907.

Tri Valley ignores a major purpose for incorporating in the Initial Decision (on remand) the findings which in principle had been sustained by the Court. As indicated in that decision the hearing examiner received further evidence and entered those findings, in part, to "appraise the scope of the relief that should be granted, since the Court of Appeals in remanding the case had set aside the Commission's order with regard to the Section 2(a) charge." R. XXII, 1907. Since the question of relief, essentially injunctive in nature, would arise at the conclusion of the remand proceedings if the Section 2(a) charges were sustained, evidence and findings as to the extent of Tri Valley's pricing practices would become important in fashioning an appropriate cease and desist order. See this Court's opinion in No. 18,125, 329 F. 2d at 710. Furthermore, such additional evidence as was adduced was also pertinent in view of the obvious relationship between the evidence supporting the findings approved by the Court and the evidence respecting which this Court desired further clarification and findings. R. XXII, 1907.

A fair reading of the Court's opinion reasonably supports the interpretation of the Commission and its examiner that "[i]n permitting new findings as to the Section 2(a) charges, the Court of Appeals clearly indicated its intention that further evidence could be adduced if necessary." R. XXII, 1907. The Court's opinion, as noted in

⁹ The decision in *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529 (7th Cir. 1953), relied on by Tri-Valley (pet. supp. br. p. 31), is inapplicable here. There, certain findings were inconsistent with the law of the case and unrelated to the issues remanded to the "inferior tribunal" for resolution.

the Counterstatement of the Case, did not limit the Commission's discretion in reasonably carrying out the Court's directions as to further proceedings. Even if the Court's opinion could be viewed as posing some uncertainty as to whether the Court and its members actually "meant what we said or said what we meant," *Federal Trade Commission v. J. Weingarten, Inc.*, 336 F.2d 687, 696 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965), the Commission's exercise of discretion in furtherance of "a system of justice dedicated to the objective of finding the truth" (*id.* at 696) was reasonable in the circumstances and not at variance with the Court's mandate.

In discharging its functions in the public interest and commensurate with due process considerations, the Commission is entitled to reasonable latitude in giving effect to the Court's directions. *Cf. P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 55 (4th Cir. 1950); *Federal Trade Commission v. J. Weingarten, Inc.*, *supra*. And, "when a reviewing court finds legal error in an administrative order, the agency is not foreclosed upon the remand of the case from enforcing the legislative policy of the act it administers, provided the new order does not conflict with the reviewing court's mandate." *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965), citing the decisions in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 200 (1947), and *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), which are also pertinent here.

The Commission's exercise of discretion in giving effect to the directed remand was entirely proper, as it "was not in disregard of the Court of Appeals' first mandate and was a good-faith attempt to incorporate the legal principles contained therein." *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 383.¹⁰ Tri Valley

¹⁰ Since the actions of the Commission upon remand involve the reasonableness of its procedures in carrying out the Court's mandate and not a question of power or "jurisdiction", Tri Valley's reliance on *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964), is misplaced. See *White v. Higgins*, 110 F.2d 312 (1st Cir. 1940).

not only had ample notice and opportunity to meet the evidence and contentions of complaint counsel but, as it concedes (pet. supp. br. pp. 19, 20), much of the evidence presented by complaint counsel was received without objection.

In the circumstances, it was unnecessary, contrary to Tri Valley's contentions (supp. br. pp. 3, 8, 11 and 20), for the Commission to apply to this Court for leave to adduce additional evidence with respect to the issues on remand in accordance with Section 11(c) of the amended Clayton Act, 15 U.S.C. § 21(c).¹¹

II. Consistent with the remand directed by this Court in the prior review proceedings in No. 18,125, the Commission properly determined that the lower prices quoted by Tri Valley to certain favored purchasers were not in fact available to the unfavored purchasers as required by Section 2(a) of the amended Clayton Act.

In the prior review proceedings in No. 18,125, this Court specifically upheld the Commission's findings that Tri Valley discriminated in price between different purchasers and, further, that the effect of such discrimination may be to substantially injure, destroy or prevent competition between chain stores receiving the benefit of such discriminations and non-favored retailer purchasers and retailer customers of non-favored wholesaler purchasers. *Tri-Valley Packing Association, Inc. v. Federal Trade Commission*, *supra*, 329 F.2d at 702. See also *In the Matter of Tri-Valley Packing Association*, *supra*, 60 F.T.C. at 1181.

The Court, while concluding that the evidence would support a finding of the requisite adverse competitive effect, noted that the Commission had not considered Tri Valley's

¹¹ If, however, the Court now determines that the Commission in its endeavor to discharge its functions in the public interest has received and considered any evidence beyond that permitted by the Court's mandate, it is requested that this Court treat the instant brief as the request and showing contemplated by Section 11(c) of that statute and, in lieu of a further remand, consider the entire record herein as if such request and showing had previously been made. No violation of Tri Valley's fundamental right to a fair hearing or of the statute itself would result from such procedure.

argument that the lower prices offered to favored purchasers in the "California Street" market were available to non-favored purchasers. The Court deemed this argument pertinent because, if true, it may establish a lack of causal connection between the price discriminations and any probable injury to non-favored purchasers. 329 F. 2d at 703-704. In ruling that the Commission should determine this question on remand, the Court explained in part (329 F. 2d at 704):

While Tri-Valley presented before the Commission the factual basis upon which this argument is made, it did no more than suggest the legal question which it now urges concerning the necessity of a casual connection between price differentials and probable competitive injury. This may explain why the Commission did not deal with the problem in its opinion or findings. . . . Disposition of this question is dependent upon the facts pertaining to the availability, to nonfavored purchasers, of the low prices for Tri-Valley products on the "California Street" market, and the application of the law to those facts.

The Court then remanded the case "for further proceedings bearing upon the unresolved price discrimination question to which we have previously referred." 329 F. 2d at 706.

The record contains clear and convincing evidence establishing that the lower prices granted the large chain purchasers were *not* available to the unfavored purchasers.¹²

¹² The question whether complaint counsel, as petitioner argues (pet. supp. br. pp. 17-18), or Tri Valley had the burden of going forward with evidence on this issue is not material here, since there is substantial evidence in the record to support the Commission's finding that the lower prices were in fact not available to unfavored purchasers. We submit, however, that as a matter of law the burden of at least going forward with evidence to prove the availability of its discounts was on Tri Valley, once proof of the discriminatory prices had been established. See the Initial Decision (on remand) as adopted by the Commission, R. XXII, 1892-93, and the Commission's opinion, R. XXIV, 2145.

The Commission's findings on this issue are amply supported by the testimony of Messrs. Walter Tewes, of Walkey Grocery Company;¹³ Samuel Arshan, of Middlesex Foods, Inc.;¹⁴ Walter Rohrs, of Middendorf and Rohrs;¹⁵ and Russell Snyder, Tri Valley's assistant sales manager in 1957 and 1958.¹⁶ Their testimony with reference to the availability issue has been fully summarized in the Commission's opinion and in the modified Initial Decision (on remand) adopted by the Commission (R. XXII, 1893-94; R. XXIV, 2145-46, 2155).

Additionally, the Commission and its examiner found that the unavailability of Tri Valley's lower prices to unfavored purchasers "is also apparent from the fact that Bushey & Wright, a broker with offices in San Francisco, represented both H. A. Marr, Denver, Colorado, and Hannaford Brothers Company, Portland, Maine, in the purchase of Tri Valley products and, nevertheless, these two purchasers consistently paid higher prices than Safeway and/or A & P." R. XXII, 1994. As the Commission and its examiner further found (R. XXII, 1894):

Apparently, having a buying representative on "California Street" is no guarantee that a purchaser will receive the lowest possible price from a supplier. If it were a guarantee it would seem that the unfavored purchasers would seek a favorable price on the "Street" through their brokers. If the prices identified were actually sought through brokers, it is apparent that the brokers were unable to obtain the favorable price on the "Street". Either inference, contrary to the contention of the respondent [Tri Valley], must lead to the same conclusion.

In discussing further the unavailability of lower prices to Marr and Hannaford, even though these firms were repre-

¹³ R. XII, 1028-37; R. XXV, 2208-30.

¹⁴ R. XII, 1065-71; R. XXV, 2230-53.

¹⁵ R. XII, 1037-46; R. XXV, 2254-69.

¹⁶ R. XV, 1290-1360; R. XVII, 1478-82; R. XXVII, 2418-78.

sented by this San Francisco broker,¹⁷ the Commission said in its opinion (R. XXIV, 2158):

A situation such as this where wholesalers were paying the higher discriminatory prices at the time they were represented by a broker on California Street, who incidentally was not instructed to quote the lower prices, clearly demonstrates that the lower prices were not in fact available to disfavored purchasers.

It is significant that on remand both the Commission and its examiner found, contrary to Tri Valley's contention before the Commission, which it continues to urge here (pet. supp. br. p. 4), that there was no "California Street" market, as such, which is distinguishable from markets outside of California. R. XXII, 1896-97. The Commission in its opinion correctly noted that "[t]he record does not support respondent's [Tri Valley's] arguments about a California Street market. The main source of information on this claimed market and its prices is the indefinite and inconclusive testimony of respondent's assistant sales manager, Russell Snyder, which the hearing examiner apparently gave little weight."¹⁸

The Commission also noted that, as appears from Mr. Snyder's statements, the listings in the various trade and

¹⁷ This situation closely parallels that found violative of Section 2(a) in *In the Matter of Fruitvale Canning Company*, F.T.C. Docket No. 5989, 52 F.T.C. 1504 (1956), *petition for review dismissed per stipulation*, 9 Cir. No. 15,246 (January 30, 1957), and the same result should obtain here. In that case, another California canner (shown in the present record to be a competitor of Tri Valley) sold its goods at higher prices to certain buyers (wholesalers and others) who were represented by brokers than it sold like goods directly to certain large retail chain stores who bought through their own buying agencies located in San Francisco. Among the favored retail chains were Safeway, A & P, American Stores and First National Stores, all of whom are among the favored retail buyers in this proceeding.

¹⁸ The Commission at this point quoted the testimony of Mr. Snyder before remand (R. XVII, 1508, 1509) and after remand (R. XXVII, 2453, 2454-55, 2456, 2457).

financial journals did not mention specific transactions but only the "general pricing level" of California Street. "It was not explained how this would inform the prospective purchaser that Tri Valley's goods were available at such prices and, in fact, the listing of the general pricing level would not necessarily mean the respondent was selling at those prices. Neither would this necessarily mean that a particular purchaser could obtain the goods from respondent at such prices." R. XXIV, 2155.

The Commission further noted that "[w]hether or not a prospective purchaser could have informed himself as to the 'general pricing level' in California, it is clear that the unfavored purchasers had not heard of so-called California Street prices." R. XXIV, 2155.¹⁹

Consistent with the findings contained in the Initial Decision (on remand) as modified and adopted by the Commission, the latter stated in its separate opinion (R. XXIV, 2155-56):

We conclude, on the basis of this record, that the California Street market is not a regular exchange, and that it apparently is no more than a location for individual buyers—mostly chain stores—who enter into their own private agreements with the various California canners. Further, so far as the favored customers were concerned, it made no difference whether the purchaser was located on the Street or off the Street. If the lower preferential prices were available to the unfavored customers, as asserted, they could only have been available on the basis of possible dealings with the respondent [Tri Valley], directly or through a broker, aside from any so-called California Street market transactions.

In determining the unobtainability by unfavored buyers of Tri Valley's lower prices, the Commission noted Tri

¹⁹ The Commission at this point quoted, as an example, certain testimony of Mr. Tewes (R. XXV, 2218) and correctly observed that "[o]ther witnesses in the trade testified to the same effect." R. XXIV, 2155.

Valley's concession that it did not "through its price lists, invoices, brokers, or employees, give any information to these wholesalers [unfavored customers] regarding prices prevailing on 'California Street'"; observed the absence of evidence in the record that Tri Valley would have given its lower prices to the unfavored buyers upon request; and referred to evidence in the record of special price lists for Safeway and First National Stores (both of whom are favored customers of Tri Valley) and testimony to the effect that "favored chains were notified as to the availability of these prices, lower than contemporaneous list prices, and that other customers were not so notified." R. XXIV, 2156-58.²⁰ The Commission correctly found that Mr. Snyder's testimony prior to remand (R. XV, 1318-19) also "makes plain that the lower prices were tailored to the requirements or demands of the favored chains." R. XXIV, 2157. Further, as reflected by the Initial Decision (on remand) as adopted by the Commission, Tri Valley did not undertake through its price lists or otherwise to advise its customers that better prices were available on "California Street." Indeed, the price lists issued by Tri Valley made no mention of "California Street" prices. R. XXII, 1893-94.

The Commission and its examiner properly concluded from the record that "[t]he low prices so obtained were clearly a result of the buying power of the chain stores, and it would be wholly unrealistic to hold that such prices were available to the smaller purchasers." R. XXIV, 2158.

Tri Valley's view of the record and the "inferences" it would draw therefrom are predicated in large measure upon an unwarranted concept of the extent a seller's goods must be made available under Section 2(a). In effect, Tri Valley asserts that unavailability can be established only when the unfavored purchasers aggressively seek the lowest possible prices, either through haggling, coercion or other means, and thereafter it is shown that such purchasers

²⁰ As examples, the Commission specifically referred to the two special price lists (Commission Exhibits 223 and 225) and certain testimony of Mr. Snyder at R. XXVIII, 2607.

paid a higher price than their competitors on goods of like grade and quality. It is clear, however, that the extraction of discriminatory prices by such methods is precisely the kind of conduct that Congress in enacting the amended Clayton Act sought to proscribe.²¹ See *R. H. Macy & Co., Inc. v. Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964); *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 363 n. 12 (9th Cir. 1966). Acceptance of Tri Valley's views on availability would ultimately result in the chains enhancing their already dominant position at the expense of the remaining wholesalers and independent firms. In carrying out the evident legislative intent of Section 2(a), sellers should be required to make known to the entire trade the terms and prices under which they would sell their goods so that legitimate "bargaining" will not be encumbered by secret deals involving rebates, price reductions and other forms of price concessions to some but not all purchasers, as found in the instant case.

We submit that such inferences as the Commission has drawn are amply supported by the record herein and are consistent with the amended Clayton Act read in the light

²¹ In rejecting Tri Valley's claim that the buyer should keep abreast of the market quotations and seek out the lowest prices, the Commission stated: "Such a position on 'availability' does not accord with the view of that term or concept under Sections 2(d) and 2(e) of the amended Clayton Act. There the term 'available' has been interpreted to require some form of notification to the customer. In the *Matter of Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059 (1957); *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F.2d 480 (2d Cir. 1962)." R. XXIV, 2156, n. 2.

The Commission also observed in its opinion that "the broad design and purpose of the amended Clayton Act was to protect the small independent against the enormous purchasing power of the large chains. Individual negotiations, like those shown here with the chains, would not be practical for the unfavored group. The smaller independents and many wholesalers are not equipped and they do not have the resources to bargain on the same footing as the large chains. To construe the Act so as to require bargaining as a basis for price equality would be to deny the protection of the Clayton Act to small customers." R. XXIV, 2158.

of its legislative history. The "inferences" or, more accurately, speculation asserted by Tri Valley throughout its argument ignores much of the record and would require a construction of the amended Clayton Act in a manner incompatible with the legislative intent.²² Even if the "inferences" favored by Tri Valley also found some significant support in the record, we submit that they would not be controlling here, for the reasons and on the basis of the authorities set forth in the Commission's first brief (filed in No. 18,125), at p. 31 n. 12.

Attempting to excuse its admittedly discriminatory pricing activities, Tri Valley further argues (pet. supp. br. pp. 22-23) that "the direct and proximate cause of probable injury to competition was the system of doing business on California Street and not Petitioner's discriminations" and suggests that the Commission should have found that others are to blame for that situation. Essentially, Tri Valley is contending that since others are engaged in similar activities, the Commission should not single out Tri Valley for corrective action. But see *In the Matter of Fruitvale Canning Co.*, *supra*.

These contentions, however, are irrelevant here. First, the Court has already decided in the prior review proceedings that Tri Valley's price discriminations had some measurable impact on resale prices. *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d at 703. Second, the fact that "everybody is doing it" has long been held neither to constitute a defense by one engaged

²² The majority of the Commission, contrary to Tri Valley's innuendo (supp. br., p. 21), drew no inferences from the findings or investigation by a congressional subcommittee, *viz.*, Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives which issued a report entitled "Small Business Problems in Food Distribution." H. Rep. No. 2234, 86th Cong. 2d Sess. (1960). The authorities relied upon by Tri Valley (supp. br. p. 5 n. 5) do not permit this Court to "look beyond the record and take judicial notice of the proceedings and report of the Subcommittee," as now requested by Tri Valley. While Tri Valley requested the Commission officially to notice such proceedings and report (R. XIV, 1173-77), it is clear that Tri Valley's request was properly denied. In any event, Tri Valley is hardly aided by the portions of the proceedings and report on which it relies.

in the same activities nor to require the Commission to seek corrective action against others. See, *e.g.*, *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958); *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *United States v. Morton Salt Co.*, 338 U.S. 632, 647-648 (1950); *Federal Trade Commission v. R. F. Keppel & Bros.*, 291 U.S. 304, 312-13 (1934); *Hills Bros. v. Federal Trade Commission*, 9 F.2d 481, 485 (9th Cir. 1926).²³

III. Consistent with the remand directed by this Court in No. 18,125, the Commission properly determined that Tri Valley has failed to show that its lower prices were made to meet equally low prices of competitors within the meaning of Section 2(b) of the amended Clayton Act.

The Commission's disposition of the second issue on remand, which pertains to the Section 2(b) defense asserted by Tri Valley, fully comports with this Court's mandate in No. 18,125, and is amply supported by the record. The Commission succinctly summarized the Court's directions on this issue, as follows (R. XXIV, 2159):

The second issue upon which the court remanded this matter concerns the Section 2(b) defense and the stated "threshold" issue of whether or not Tri-Valley is engaged in meeting competitive prices within the meaning of the Section 2(b) proviso. Stated otherwise, it seems that the question is whether the alleged meeting of the so-called California Street market prices was in fact meeting "an equally low price of a competitor," *i.e.*, a response to individual competitive demand rather than the meeting of prices on a systematic basis not contemplated by the proviso. *Cf. Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 401 (1958).

The Commission, considering the Court's reasons for remanding, expressly construed the Court's mandate as making it "incumbent" upon the Commission to determine not only whether Tri Valley's price discriminations were

²³ See also p. 6, n. 3 of the Commission's brief in No. 18,125, wherein somewhat similar contentions of Tri Valley are treated.

made pursuant to or to meet an illegal pricing system, but also whether Tri Valley's proof of meeting individual competitive demands satisfies the basic requirement established by the Supreme Court in *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759 (1945) (R. XXIV, 2161).²⁴ The requirement laid down in *Staley* is that a seller, "who has knowingly discriminated in price", must show the existence of facts "which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." 324 U.S. at 759.

The Commission found on remand that while Tri Valley "consistently discriminated in favor of chain store buyers, the record does not support a finding that either [Tri Valley] or its competitors were selling pursuant to a pricing system" (R. XXIV, 2160). In resolving the further question posed by the Court's remand, namely, whether Tri Valley's lower prices were in response to individual competitive demands, the Commission further held on the basis of the entire record, including the evidence adduced on remand, that Tri Valley had not sustained its burden, as defined in *Staley, supra*, on this question (R. XXIV, 2145-46, 2159-63; R. XXII, 1894-98, 1908-11).

Tri Valley argues that since the Commission did not question Tri Valley's evidence that it was meeting competitive prices in the original proceeding, it is now precluded from doing so in the remand proceedings (pet. supp. br. pp. 10-11, 25-29). This evidence consisted chiefly of the undocumented statements of Tri Valley's assistant sales manager that Tri Valley's price discriminations were made to meet the prices of its competitors (R. XXIV, 2161-62; R. XXII, 1895-97). Tri Valley's argument, however, misunderstands both the scope of the Commission's functions on remand and the Commission's reasons for now finding Tri Valley's proof insufficient.

²⁴ It cannot be doubted that the seller has the burden of sustaining a Section 2(b) defense. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951); *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945). See also the discussion and additional authorities found at pp. 39-41 of the Commission's brief in No. 18,125.

First, this Court on the appeal from the original Commission's decision never considered the question whether Tri Valley had sustained its burden under Section 2(b) of meeting individual competitive demands, because it desired the Commission to pass first upon the "threshold" question of whether Tri Valley was meeting prices on a systematic basis or was responding to individual competitive demands. 329 F. 2d at 706. It was thus entirely proper for the Commission on remand to reappraise Tri Valley's proof on meeting competition in light of the additional evidence introduced in the remand proceedings (*supra*, pp. 14-17).

Secondly, the Commission in its decision has fully given its reasons for now finding that Tri Valley has not sustained its burden with respect to meeting competitive prices. The Commission pointed out (R. XXIV, 2162) that while the hearing examiner in his first initial decision found on the basis of evidence adduced by Tri Valley that the latter was meeting a market price, he also found that the evidence was insufficient to establish that the discriminatory prices were to meet individual competitive situations. Subsequent to the remand, the same hearing examiner again held that respondent's proof was not adequate to show that its price reductions were made defensively to meet the prices of competing sellers in specific transactions. No finding was made this time, however, that Tri Valley was nevertheless meeting a market price.²⁵

The Commission agreed with the conclusion of the examiner as to the inadequacy of Tri Valley's proof on meeting

²⁵ As the Commission observed (R. XXIV, 2162): "Testimony adduced by respondent after remand in support of its argument that California Street prices were universally available, *i.e.*, that anyone 'could buy merchandise on the general market levels as cheaply as California Street, anywhere in the country', tends to distort the 'California Street' market concept originally presented by respondent in support of its argument that it was required to sell at lower prices to meet the price level in the California Street market. In view of this testimony and respondent's failure to present evidence as to the prices charged by its 'California Street' competitors, even though respondent asserted that these prices were carried in various publications, the hearing examiner quite understandably did not find in his second initial decision that respondent was meeting a market price."

competitive prices, since Tri Valley "failed completely" to satisfy its "burden of establishing that it was in fact acting defensively in response to lower prices of a competitor." As the Commission further noted in part, "[a]side from the self-serving statements that [Tri Valley] was a price follower and not a price leader there is nothing in the record to show that respondent's lower discriminatory prices were made in self-defense in response to competitors' prices or offers". R. XXIV, 2162.

Nor can it be doubted that the Commission and the examiner properly gave no weight to the unsupported self-serving *assertions* of Tri Valley's assistant sales manager in resolving the second remand issue, since "general testimony", without documentation or specific evidence, is insufficient to warrant a finding that a lower price was made in good faith to meet a competitor's equally low price.²⁶ (R. XXIV, 2163). See *Corn Products Refining Co. v. Federal Trade Commission*, 144 F.2d 212, 217 (7th Cir. 1944), *affirmed*, 324 U.S. 726 (1945); *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 758-759 (1945); *Cf. Continental Baking Co.*, FTC Docket 7630 (1963).²⁷

²⁶ "If it were," as the Commission has observed, "any seller who may be discriminating in price, including those who were not meeting competitors' prices, could successfully defend against a 2(a) charge simply by claiming that competition forced them to discriminate" (R. XXIV, 2163).

²⁷ In deciding that Tri Valley has not sustained its burden of establishing that its lower prices were made to meet individual competitive prices, the Commission has not receded in any way from its holding in its first decision that a seller's affirmative duty under Section 2(b) requires the seller not only to prove that it reduced its prices in good faith to meet the equally low price of a competitor, but also to demonstrate the existence of facts which would lead a reasonable person to believe that the lower prices being met were lawful prices (see R. VI, 584-5). Since the Commission has now found, however, that Tri Valley has not established that it was meeting any individual competitive prices, there is clearly no need for the Commission to determine further whether Tri Valley has satisfied the burden of demonstrating that it had reason to believe the prices to which it was assertedly responding were lawful prices.

Tri Valley on this appeal, however, argues that there is "implicit" in the "awareness" of the San Francisco market conditions attributed to it (in the Commission's findings prior to remand) "the notion that it had exercised due care in ascertaining conditions in the market including competitors [sic] prices" and that further litigation of the matter is thus precluded (pet. supp. br. p. 27). Apart from the fact that such "notion" was not included among the specific findings made by the Commission prior to remand, Tri Valley's argument simply ignores the fact that the findings referred to dealt with the now discredited testimony of Mr. Snyder that Tri Valley was meeting competitive prices (*supra*).

Furthermore, since one having the "awareness" of market conditions including competitors' prices asserted by Tri Valley could also be well aware that it was not actually meeting in good faith specific lower prices of its competitor, Tri Valley's failure to present the requisite documentation or evidence to support the general testimony of its assistant sales manager, Mr. Snyder, becomes highly significant. Inasmuch as Tri Valley allegedly possessed such "awareness," it necessarily follows that Tri Valley would have presented documentation or supporting evidence as to its defensive meeting of specific lower prices of its competitors to satisfy its burden of proof under the Section 2(b) defense, if such documentation or specific evidence had been favorable to Tri Valley's claims. Therefore, far from being aided by findings or evidence of such "awareness" and even of "due care" or "diligence," Tri Valley's inexplicable silence respecting such documentation or specific evidence strongly militates against the conclusory assertions made on its behalf that it was defensively meeting in good faith specific lower prices of its competitors. See *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154-155 (1923); *Kjar v. Doak*, 61 F. 2d 566, 570 (7th Cir. 1932).

The Commission, contrary to Tri Valley's broadside arguments (supp. br. p. 29), fully considered the testimony of Tri Valley's witness, Mr. Snyder, in deciding the second remand issue. As accurately reflected by the Commission's present findings and separate opinion, the sum total of Tri

Valley's evidence on the "threshold" issue consists of conclusory, self-serving statements that his company was meeting competitive market prices. His testimony, as noted, is general in nature and wholly unsupported by documentation or specific evidence as to the prices of competitors actually being met.

Mr. Snyder's testimony as to Tri Valley's general policy of meeting only competitive pricing practices is refuted by Commission Exhibits 223, 224 and 225 and the testimony adduced in connection therewith, showing that Tri Valley developed special price lists in dealing with two favored chain store purchasers. Tri Valley failed to present through Mr. Snyder or anyone else the particular competitors who had the same prices or lower prices contained in the special price lists. Additionally, Commission Exhibits 216, 217, 218 and 219, which Mr. Snyder was unsuccessful in explaining away, show that Tri Valley did not meet competitive prices with respect to the sale of tomato paste.

The evidence adduced before and after remand, as noted more fully under Point II of this argument, amply supports the findings of the Commission and its examiner that there was no "California Street market" as distinguished from markets outside of California. Mr. Snyder testified²⁸ generally that in certain (unspecified) instances customers may obtain lower prices if they weren't on "California Street" (R. XXII, 1896; R. XXVII, 2453). But no evidence was

²⁸ And in language appropriate here, this Court observed in *Fred Meyer* (359 F.2d at 360-61):

This instance merely points out two factors common to Commission proceedings and to our review of them. First, those witnesses in possession of the most enlightening evidences are usually representatives of respondents or potential respondents, who have an interest in revealing only what they must and in volunteering nothing. Second, application of the Commission's reserve of expertise to this sometimes painfully extracted testimony may produce conclusions, and valid conclusions, quite different from those which an uninitiated fact-finder might reach. And, of course, the Commission and its Hearing Examiner are closer to the facts than we are, and we cannot discount the justifiable effect which weak and evasive responses, apparent even on the face of this cold record, may have had on them.

introduced showing that Mr. Snyder's general description of "California Street" practices were followed by competitors. And, as previously noted, several wholesalers testified that they never heard of "California Street prices" until their appearance at the administrative hearing (R. XXIV, 1896).

It is submitted that the Commission and its examiner properly weighed the credibility of the witnesses²⁰ and were not arbitrary in refusing to place any credence in Tri Valley's Section 2(b) defense. These matters, therefore, are precluded from consideration upon judicial review. See the discussion and authorities contained at p. 31, n. 12, of the Commission's brief in No. 18,125.

IV. Consistent not only with the remand directed by this Court in No. 18,125 but also the Supreme Court's decision in the related case of *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), and the Modified Final Decree subsequently issued by this Court in that case, the Commission properly determined that Tri Valley has violated Section 2(d) of the amended Clayton Act.

The Commission and its examiner properly concluded on remand that Tri Valley has violated Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), by paying advertising and promotional allowances to some customers without making such allowances available on proportionally equal terms to all other customers competing in the distribution of Tri Valley's products. It is not disputed that Tri Valley paid advertising and promotional allowances

²⁰ In weighing the credibility of witnesses, the trier of the fact may consider the demeanor of the witnesses, the probability or improbability of their testimony, inconsistencies, patent omissions and discrepancies in their testimony, their interest in the outcome of the case and relationship to the litigants. This is true even if the testimony of the witness is uncontradicted. *Young Ah Chor v. Dulles*, 270 F.2d 338 (9th Cir. 1959); *Joseph v. Donover Company*, 261 F.2d 812 (9th Cir. 1958); *Seletos v. Commissioner of Internal Revenue*, 254 F.2d 794 (8th Cir. 1958). These standards, as reflected by the Commission's decision and the supporting record, were plainly followed in this case.

to Central Grocers, Inc., of Boston, Mass., and Fred Meyer, Inc. of Portland, Oregon, but to no others in those areas (pet. supp. br. pp. 12, 15).³⁰

The Commission's findings and conclusions are consistent with the Court's mandate in No. 18,125, wherein the Court set aside the findings, conclusions and order of the Commission respecting the Section 2(d) violations but directed (329 F.2d at 710):

As we have remanded this cause for further proceedings with regard to other matters we think it appropriate to afford the Commission on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming or actual, lack of factual support for the section 2(d) charges as discussed above.

A. The allowances to Central Grocers

Tri Valley does not question the fact that it granted allowances to Central Grocers under an arrangement which had not been made available to Standard Grocery and Food Centre Wholesale Grocers, who were competitors of Central Grocers and purchased goods from Tri Valley at approximately the same period of time. Tri Valley does take issue (pet. supp. br. p. 32) with the Commission's finding (R. XXIV, 2166) that the allowance was given to promote a general line of products. It claims, without elaboration, that this finding is contrary to the evidence which shows that the payments were made on the number of cases of canned fruits purchased. However, as the Commission pointed out (R. XXIV, 2168), this finding is amply sup-

³⁰ The examiner's Initial Decision (on remand) contains specific findings and conclusions, together with references to the Court's opinion in No. 18,125 and the supporting evidence of record, sustaining the Section 2(d) charges (R. XXII, 1876-79, 1881-85, 1898-1903, 1911-1913, 1911-15). The factual findings and conclusions were essentially adopted in their entirety by the Commission which, in its separate opinion, has discussed the matter further (R. XXIV, 2145-47, 2146-67, 2168).

ported both by the testimony of Tri Valley's own official and by the stipulation of its counsel (R. XVIII, 1488-1489; XXVIII, 2531).

The controlling fact here is that Tri Valley's arrangement for the payment of allowances based on any product purchased from Tri Valley's *general line* was made available to Central Grocers but not to Standard Grocery, Food Centre Wholesale Grocers or, indeed, any other wholesaler in the Boston area in approximately the same period of time. As the arrangement contemplated the payment of allowances on Tri Valley's general line of products, the Commission properly considered the *particular* products purchased from Tri Valley by Central Grocers, Standard Grocery and Food Centre Wholesale Grocers as irrelevant. It is sufficient and undisputed that these three wholesalers in the Boston area were customers of Tri Valley at approximately the same time that the latter was making payments to Central Grocers under such arrangement. See *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43, 50 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958).

Tri Valley fails to demonstrate the manner in which any finding allegedly "conflicts with the law of the case" (pet. supp. br. p. 32). Nothing in the Court's opinion in No. 18,125 supports Tri Valley's broad contentions. Unlike the situation with respect to the Section 2(a) charges, this Court not only vacated the order but also the findings and conclusions with respect to the Section 2(d) charges.³¹ The Court thus made it clear that further findings must be made and additional evidence could be adduced with respect to the latter charges.

The Commission and its examiner, for the reasons more fully discussed in the findings (R. XXII, 1911-1913), properly viewed the Court's opinion in No. 18,125 as permitting

³¹ Many of the same arguments made under part I of this argument, *supra*, respecting the propriety of the Commission adducing further evidence and making further findings and the inapplicability of the law of the case doctrine likewise would apply here if Tri Valley's broad contentions as to the limited scope of the remand concerning the Section 2(d) charges were deserving of more serious consideration.

the Commission to adduce further evidence and make further findings in accordance with the criteria set out in the opinion at 329 F. 2d at 707-708. Surely, the Court's mandate did not proscribe the Commission from adducing further evidence regarding others who were not accorded allowances. This would include evidence respecting Food Centre Wholesale Grocers, a wholesaler in the Boston area, as well as "another retailer" (apparently Safeway Stores, Inc.) in the Portland area discussed below. *Zdanok v. Glidden Co.*, *supra*, upon which Tri Valley relies (pet. supr. br. pp. 32-33), is clearly inapposite here.

B. *The allowances to Fred Meyer*

With respect to the Portland area, Tri Valley challenges the finding of discrimination against Safeway because of the failure to make available to the latter the allowances given to Fred Meyer, Inc., to promote the sale of Tri Valley's canned peaches, the product involved in Fred Meyer's coupon book program.³² The finding is alleged to be deficient since "these customers did not buy petitioner's promoted products at approximately the same time" and inasmuch as "there is no evidence showing that market conditions had remained essentially the same dur-

³² The same transactions involving Tri Valley and Fred Meyer, as well as the latter's coupon book program have already been considered in the case of *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 362 (9th Cir. 1966), *rev'd in part*, 390 U.S. 341 (1968). There, the relationship between the free goods given Fred Meyer upon the redemption of the coupons was found so disproportionate as to render this portion of the promotion scheme a price discrimination under Section 2(a), while other aspects of the matter were considered with respect to the Section 2(d) violations. In the light of this Court's opinion in *Fred Meyer*, *supra*, 359 F.2d at pp. 361-362, as well as the authorities discussed, *supra*, in Point I of this argument, we submit that the Commission in the present case properly followed the Court's ruling in *Fred Meyer* as to the same matters. See the Commission's discussion of this matter in its opinion (R. XXIV, 2168). Contrary to Tri Valley's view (pet. supp. br. p. 31), *Morand Bros. Beverage Co. v. National Labor Board*, *supra*, does not require a different result.

ing the period that elapsed between Safeway's *last* purchase made on April 1, 1957, and Fred Meyer's promotional campaign which began on September 1 of that year." Pet. supp. br. pp. 32-33. Both Fred Meyer and Safeway were retail customers of Tri Valley who competed in the Portland area in the distribution of such peaches but Tri Valley neither offered nor paid promotional allowances on proportionally equal terms to Safeway in that area (R. XXII, 1898-1900; R. XXIV, 2166).

The salient facts are that both Fred Meyer and Safeway purchased canned peaches of like grade and quality from Tri Valley at approximately the same time that Tri Valley and Fred Meyer were *negotiating* on a contractual arrangement respecting the latter's *coupon book program* (Commission Exhibits 10, 11, 31-33). Noting the date of the coupon committee approval which is shown in Commission Exhibit 11 as February 27, 1957, the Commission properly found (R. XXII, 1900 n. 38):

[I]t is apparent that negotiations between Tri Valley and Fred Meyer concerning participation in the 1957 coupon program occurred prior to the end of February 1957. Safeway was a customer of Tri Valley in the purchase of canned peaches from January through March of 1957, at about the time Fred Meyer was also a customer of respondent in peaches of the same grade and quality, and at the time when negotiations were under way for participation in the 1957 book program.

It is not significant that Fred Meyer's 1957 promotional campaign began in September of that year while Safeway's last purchase of canned peaches from Tri Valley occurred in April 1957. Since "here the sales are of single, fairly standardized item widely sold in the area, and recur frequently during the years involved," Tri Valley's contentions must fail. *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d at 357, distinguishing *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958).

We submit that the Section 2(d) violations found by the

Commission are sufficient to sustain the Commission order.³³ Nonetheless, a further matter merits discussion here.

Although neither briefed nor even cited by Tri Valley, the latter has squarely placed in issue on this appeal the decision of the Supreme Court in the related case of *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), *reversing in part*, 359 F.2d 351 (9th Cir. 1966). We have shown, as more fully discussed in our Counter-statement of the Case, that that decision as well as the Modified Final Decree issued by this Court in that case are pertinent here and warrant reconsideration of this Court's prior ruling in No. 18,125, insofar as it requires a showing of functional competition with respect to the Section 2(d) violations. Indisputably, this matter is appropriate for review here. See *White v. Higgins, supra*, 110 F.2d at 318.

In *Fred Meyer*, the Supreme Court held that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" within the meaning of Section 2(d) and to whom the seller must make its promotional payments available.³⁴ In remanding the case "for further

³³ The sufficiency of the Section 2(d) violations found by the Commission to support an order has in fact been admitted by Tri Valley's counsel, who stated (R. IX, 807-808):

[I]t's my understanding of the case that theoretically proof of one or two violations is sufficient to sustain the Commission's charges, a prima facie case is made, and no rebuttal of that prima facie case is made, and for that reason I see nothing—it would be oppressive, it seems to me, Your Honor, if that's all the Commission need do, to take us all over northern Oregon, Washington, and other areas, in order to prove their case.

³⁴ In view of the Supreme Court's decision in *Fred Meyer*, the Commission has proposed to amend its published "Guides For Advertising Allowances and Other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act," 16 C.F.R. 240.1 *et seq.* The proposed amendments, together with a notice of opportunity to present written views, suggestions or objections, have been published, 33 Fed. Reg. 10616 (July 25, 1968). The written submissions received from interested parties are now under consideration by the Commission and its staff. A review

proceedings," that Court reversed the judgment of this Court "insofar as it held that the promotional allowances *granted Meyer by Tri Valley* and Idaho canning did not violate § 2(d)" (italics supplied). 390 U.S. at 358.

Significantly, the same transactions and essentially the same evidence respecting Tri Valley's participation in Fred Meyer's coupon book program were involved in the *Fred Meyer* case as in No. 18,125. This is reflected by the opinions and records in those cases. The findings and evidence in the present case include those reviewed in No. 18,125³⁵ and, as noted, certain additional evidence. It would be anomalous, therefore, for this Court in this later proceeding to reach a result not in accord with that in the now concluded *Fred Meyer* case.

As the Commission has noted in its opinion after remand (R. XXIV, 2167):

There were other direct customers of Tri Valley purchasing products of like grade and quality at or about the same time such products were purchased by the favored customers receiving the special advertising or promotional allowances. The court, however, as to the Boston area, ruled that such other customers, who in that instance were retailers, were not entitled to treatment comparable to that accorded Central Grocers, because they were not in functional competition with the wholesaler. (329 F. 2d at 709.) In regard to the Portland area, as noted above, the court similarly held that Hudson House, which is principally a wholesaler, was not in functional competition with Fred Meyer, the favored retailer. (329 F. 2d at 709-710.) [Italics supplied.]

of the proposed amendments reflects that there are no inconsistencies in the positions being asserted on the Commission's behalf in this brief.

³⁵ Further, the Commission's brief in No. 18,125 at pp. 18-24, 59-63, sets forth and discusses in considerable detail the evidence and prior findings of the Commission respecting the Section 2(d) charges.

While the Commission's findings and conclusions after remand were necessarily drafted in the light of this Court's opinion in No. 18,125, we submit that the above italicized portion of the Commission's opinion finds ample support in the evidence of record and, in considerable part, the Initial Decision (on remand) as adopted by the Commission. Since violations of Section 2(d) have been established apart from the evidence disregarded by this Court in No. 18,125 prior to the *Fred Meyer* decisions, the Court need only consider the latter evidence for the purpose of appraising the scope of the relief sought by the Commission in the hereinafter proposed modification to the Commission's *present* order to cease and desist order, as discussed below under Point V of this argument.

V. The modified order proposed herein is reasonably related to the violations of law found by the Commission and conforms to the Supreme Court's decision in *Fred Meyer* and the Modified Final Decree subsequently issued by this Court in that case.

The Commission's present cease and desist order, as noted in the Counterstatement of the Case, differs from the one previously set aside by this Court in that it is narrower in scope with respect to the prohibition against Section 2(d) violations.

Recognizing that this Court in its opinion had expressed a need for limiting the order with respect to the Section 2(d) violations, the Commission in its opinion on remand directed a narrowing of the form of order for those violations. R. XXIV, 2167. Accordingly, paragraph 2 of the Commission's present order, which pertains to the Section 2(d) violations, proscribes, *inter alia*, "the paying or contracting for the payment of anything of value to or for the benefit of respondent" when made "pursuant to a specially tailored or negotiated arrangement." The latter phrase is not contained in the order set aside by this Court or the one subsequently recommended in the hearing examiner's Initial Decision (on remand). Compare R. VI, 578 and R. XXII, 1916-17 with R. XXIV, 2147.

The present order, therefore, is clearly more favorable to Tri Valley than the one set aside in No. 18,125 or subsequently recommended by the hearing examiner. Nonetheless, Tri Valley challenges the breadth and scope of the Commission's present order on the same grounds asserted in the prior review proceedings in this Court with respect to the first (and now superseded) Commission order. Tri Valley's objections (as incorporated by reference in its supplemental brief, at p. 33) are adequately disposed of at pp. 65-75 of the Commission's brief in No. 18,125 and, additionally, in the Commission's opinion on remand (R. XXIV, 2167) so as to obviate further discussion here.

Further modification of the Commission's present order, however, now is desired in the light of the subsequent decision of the Supreme Court in the related *Fred Meyer* case and the Modified Final Decree thereafter issued by this Court in that case (No. 18,903).³⁶ That decision as well as the subsequent Modified Final Decree in that case, as discussed in the Counterstatement Of The Case, has rendered inappropriate paragraph number 2 of the present Commission order in the instant case.

Section 11(d) of the amended Clayton Act, 15 U.S.C. § 21(d), provides that upon the filing of the record the reviewing court acquires exclusive jurisdiction of the matter. Since the record already had been filed herein when the Supreme Court ruled in *Fred Meyer*, the Commission has been without jurisdiction to modify the present order in accordance with that ruling or, indeed, the subsequent Modified Final Decree of this Court in that case. While the Commission thus has not been able to take formal action to modify the order, it has formally considered the matter and determined the form of modified order which it believes should be entered in this case. The modification desired by the Commission consists of adding to the present language of paragraph 2 of the order the phrase "including

³⁶ The said Modified Final Decree, which sets forth the Commission's modified order to cease and desist order affirmed and enforced therein, is reproduced in the Appendix to this brief.

customers who do not purchase directly from respondent'' so that the order after modification will read in its entirety as follows:

IT IS ORDERED that respondent, Tri Valley Growers, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.
2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers of respondent, including customers who do not purchase directly from respondent, who compete in the distribution of such products with the favored customer.

It is requested that the Court modify the present order of the Commission as shown above.³⁷

³⁷ This request is similar to that made by the Commission in its brief in this Court in *Clairol Incorporated v. Federal Trade Commission*, No. 21,235, which involves issues as to Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d), and an appropriate modification of a Commission cease and desist order issued prior to the Supreme Court's decision in *Federal Trade Commission v. Fred Meyer, Inc.*, *supra*.

CONCLUSION

Wherefore, the Commission's present order should be modified by the Court as requested and affirmed and enforced as so modified.³⁸

Respectfully submitted.

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January, 1969

³⁸ "To the extent that the order of the Commission * * * is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission * * *." Clayton Act, Sec. 11(c). 38 Stat. 734, as amended July 23, 1959. 73 Stat. 243; 15 U.S.C. § 21(c).

APPENDIX

APPENDIX

Filed Oct. 8, 1968 Wm. B. Luck, Clerk

**United States Court of Appeals
for the Ninth Circuit**

No. 18,903

FRED MEYER, INC., et al., *Petitioners.*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

MODIFIED FINAL DECREE

This Court on July 1, 1966, pursuant to petition filed by petitioners herein, having issued its "Final Decree" modifying, and affirming and enforcing as so modified, the order to cease and desist issued against petitioners on July 9, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Docket No. 7492"; and the Supreme Court of the United States on March 18, 1968, pursuant to petition filed by respondent, having issued its opinion and judgment remanding the case to this Court with instructions to remand it to the Commission for further proceedings in conformity with the opinion; and this Court on May 16, 1968, having issued its mandate remanding the case to the Commission for further proceedings in conformity with the opinion of the Supreme Court of the United States; and the Commission on June 13, 1968, in accordance with said mandate, having issued its modified order to cease and desist in conformity with the opinion of the Supreme Court, and on August 14, 1968, having certified to this Court a copy of said modified order to cease and desist, reading as follows:

IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., in connection with the offering to purchase or purchase by or on behalf of respondent Fred Meyer,

Inc., in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, in connection with any promotional scheme consisting of distribution of coupons, to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme, and discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is:

(a) below the net price at which such products of like grade and quality are being sold by such seller to any other purchaser with whom respondent Fred Meyer, Inc., competes, or with whose customer or customers said respondent competes and

(b) not a price differential which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which products are sold and delivered by such seller and

(c) not a price change in response to changing conditions affecting the market for or marketability of such products, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned and

(d) not a price made in good faith to meet an equally low price of a competitor of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives

and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., directly or through any corporate or other device in or in connection with any purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers, including retailer customers who do not purchase directly from such supplier, who compete with respondent Fred Meyer, Inc., in the sale of such supplier's products.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that said modified order to cease and desist issued by the Commission on June 13, 1968, be and it hereby is, affirmed, that petitioners be, and they hereby are, ordered to obey and comply with said modified order, and that the aforesaid "Final Decree" issued by this Court on July 1, 1966, and it hereby is, henceforth superseded by this Modified Final Decree.

/s/ GILBERT H. JERTBERG
 /s/ BEN C. DUNIWAY
 /s/ ROGER D. FOLEY

No. 21337

In the
United States Court of Appeals
For the Ninth Circuit

TRI VALLEY GROWERS, formerly known as
TRI-VALLEY PACKING ASSOCIATION
(a corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

[Supplemental] Brief for Petitioner

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No. 21337

In the

United States Court of Appeals

For the Ninth Circuit

TRI VALLEY GROWERS, formerly known as
TRI-VALLEY PACKING ASSOCIATION
(a corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Supplemental Brief for Petitioner

STATEMENT OF JURISDICTION

Petitioner herein is Tri Valley Growers, a corporation, formerly known as Tri-Valley Packing Association.¹

This supplemental brief is filed on behalf of Petitioner to review and set aside a second Order of Federal Trade Commission issued on *July 28, 1966*, and served on Petitioner on *August 15, 1966* (R. XXIV, 2145-2147).

The second order is based (as is the one that preceded it) upon two complaints filed by the Commission against Petitioner several years ago. The details of these complaints are set forth in

1. This change of name does not in any way affect the matters before the Court for decision.

Petitioner's brief filed with this Court when the matter *first* came before it on Petitioner's *first* petition for review (Brief for Petitioner, Docket No. 18, 125, pp. 2; 7; 25-26).

These complaints, separately charge violations of sections 2(a) and (d) respectively of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C. Section 13(a) and (d)].

Petitioner filed its second petition for review on *October 13, 1966*, i.e., within 60 days after the service of the order. Jurisdiction of this Court is expressly provided by Section 11(c) of said Act [15 U.S.C. 21(c)], which authorizes the filing, within sixty (60) days after the service of a Commission order, of a petition to review in the Court of Appeals of any circuit within which the person or corporation against whom the order is issued resides or carries on business.

Petitioner is a farmer-owned and operated, non-profit co-operative corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, and carries on business within said State of California (R. I, 2; R. II, 106; R. VI, 573; 588; R. VII, 628-630).

Accordingly, this Court has jurisdiction to review and set aside said second order.

STATEMENT OF THE CASE

The Commission, with one of its members dissenting, has on two occasions decided that Petitioner violated sections 2(a) and (d) of the Act [15 U.S.C. 13(a) and (d)], and pursuant thereto has issued successively two cease and desist orders in effect enjoining in the broadest terms Petitioner from discriminating in prices and advertising allowances between its competing buyers of its canned goods of like grade and quality (R. VI, 578; XXIV, 2146-2147). The first of these two decisions was on review reversed by this Court and the case was thereupon re-

manded by the Court to the Commission for the resolution of certain issues relevant to both charges as directed in the Court's opinion embodying its mandate. *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d 694 (9 Cir. 1964)²

In remanding the cause this Court noted:

"Any judicial review following the entry of Commission's orders resulting from proceedings on remand may be upon the present record and briefs as appropriately supplemented" (329 F.2d 710).³

By this petition Petitioner seeks review and reversal of the second Order or decision of the Commission.

The second opinion of the Commission rationalizing the issuance of its second order is reported in C.C.H. *Trade Req. Rep.* Par. 17,657, p. 22,934 (Transfer Binder 1965-1967). The second dissenting opinion of Commissioner Elman is also reported in the same publication beginning at page 22,942. (See also R. XXIV, 2169-2181). The initial decision of the hearing Examiner adverse to Petitioner, as modified "for clarification and to conform it" to the opinion of the majority was adopted as the decision of the Commission (R. XXIV, 2145). C.C.H., *Trade Req. Rep.*, supra, p. 22,934. These opinions and the initial decision are part of the record before the Court (R. XXII, 1876-1936; R. XXIV, 2148-2168). The proceedings had in connection with issuance of the prior order, including the majority and dissenting opinions, are reported in *The Matter of Tri-Valley Packing Association*, 60 F.T.C. 1134 (1962). These proceedings and

2. The parties did not petition the Supreme Court for certiorari within the time allowed by law and accordingly the judgment of the Court and its mandate became final [15 U.S.C. 21(c); 28 U.S.C. 1254].

3. The parties did not apply to the Court for leave to adduce additional evidence [15 U.S.C. 21(c)], but the Court by its mandate did grant the Commission restricted leave to produce additional evidence in connection with the Section 2(d) charges (329 F.2d 710).

opinions are also part of the record (R. IV, 353-378; R. VI, 572-587; 588-591).

The Section 2(a) charges brought against Petitioner, and Petitioner's "meeting of competition" defense (329 F.2d 704), and the issues remanded by the Court in connection therewith center about the selling practices and prices prevalent in "California Street", a well-known and long established food products market whose geographic hub is lower California Street in San Francisco, California. The opinion of this Court contains a brief description of this complicated market which is based entirely on the uncontradicted testimony of Petitioner's assistant sales manager (329 F.2d 694; 696; 704-705).

The operations of this market or "location"⁴ were also the subject of an investigation conducted by Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives. The conclusion drawn from the oral and documentary evidence produced during this inquiry are embodied in a comprehensive report entitled "Small Business Problems in Food Distribution." H.Rep No. 2234, 86 Cong., 2 Sess. This report is mentioned and a part thereof is quoted in the dissenting opinion of Commissioner Elman (R. XXIV, 2169-2171). The Subcommittee's hearings at which the evidence concerning "California Street" was secured were held in San Francisco in October and November 1959, long before the issuance of the Commission's first order and decision. (Hearings before Subcommittee No. 5, Part II, Vols. 1-2). We believe that on this second petition for review this Court may properly look beyond the record and

4. The second majority opinion states, "We conclude on the basis of the record that the California Street market is not a regular exchange, and that it is apparently no more than a location for individual buyers . . . mostly chain stores . . . who enter into their private agreements with the various California canners" (R. XXIV, 2155).

take judicial notice of the proceedings and report of the Subcommittee.⁵

The undisputed facts in the record concerning the California Street market and how prices in that market are determined were summarized in the Court's opinion, as follows:

"The canners and processors who participate in the California Street market sell most of their products in that market. As of 1957, the prices paid for goods in this market tended to be lower than the prices paid for the same or similar goods by purchasers who were not represented in it.

At the beginning of the pack year, the canners and processors who sell on the California Street market determine from their records the amount of goods sold to various buyers in previous years. The sellers then attempt to obtain 'reservations' from the buyers for a given amount of merchandise to be delivered during the buying season, preferably in excess of that previously purchased.

After the reservations have been entered into, the canners announce their 'opening prices.' These opening prices are usually announced by the large or important factors in the industry comprised of the three or four nationally-advertised brand packers, or independent packers, of a particular commodity. When these price leaders have named their opening prices, the other canners, after examining their costs, will usually follow and name prices which are substantially similar to those of the leaders.

After the opening prices have been announced, they are analyzed by the buyers, *who then set the market price at the level of the lowest prices offered by reliable canners, and proceed to place their orders.* A canner whose prices are in line with the established prices will receive a fair share of shipping instructions. If he does not, or if he receives

5. *Arizona v. California*, 283 U.S. 423, 452-454, 75 L ed 1154, 1164-1165 (1931); *United States v. Darby*, 312 U.S. 100, 109, 85 L. ed 609, 614 (1941); *Greeson v. Imperial Irrigation District*, 59 F.2d 529, 531 (9 Cir. 1932); *Overfield v. Pennroad Corporation*, 146 F.2d 889, 898 (3 Cir. 1944). Moreover, Petitioner requested the Examiner and the Commission officially to notice the proceedings and report of the Subcommittee (R. XIV, 1173-1177).

instructions only for limited quantities, the canner checks with the brokers, buyers or with other canners to determine the reason." (329 Fed. 2d, 694; 705; emphasis added.)

To supply some of the details lacking in this brief description of the market, we call attention to the following finding of Subcommittee No. 5.

"The vertical integration of the wholesaling and retailing functions in the food distribution industry have reduced greatly the number of parties on the buying side of the market with whom the many thousands of firms engaged in manufacturing and processing food may bargain for disposition of their wares. For example, California, with its hundreds of food processors and packers, produces more than one-half the national output of canned fruits and vegetables. Eighty percent of the California output is purchased by representatives of about 15 firms which have integrated wholesale and retail food distribution functions. The retail food stores, in disposing of the items purchased by these 15 firms, do a total retail food business of more than \$15 billion. The representatives of these 15 firms serving as field office purchasing agents are concentrated in offices located on or near California Street, San Francisco, Calif. Therefore, they have become known as California Street buyers. In conducting negotiations with the representatives of canners, each of these 15 California Street buyers deals with several hundreds of sellers, but the representatives of those hundreds of sellers, in disposing of about 80 percent of their total offerings, find themselves able to deal with one or more of the approximately 15 California Street buyers. Thus, in that instance, the vertical integration of wholesaling with food retailing has resulted in heavy concentration on one side of the market, and left the opposite side of the market in a much weaker bargaining position."⁶ (Report of Subcommittee No. 5, p. 39.)

6. For similar findings regarding the operations of this market, the attention of the Court is called to the following portions of the Report of Subcommittee No. 5, pages 9-10; 12; 56-58; 64-65.

We submit that the foregoing amply demonstrates that Petitioner's price reductions or discriminations in this market were made defensively to meet the price of competing sellers in specific transactions pursuant to the proviso appended to Section 2(b) of the Act [15 U.S.C. 13(b)] and that it furnishes overwhelming and uncontradicted proof that not even as a matter of conjecture, Petitioner could have been primarily responsible for the "low" California Street prices (R. XXIV, 2162).

It should also be noted that in its first opinion and decision, the Commission, in effect, condemns the market thus described as "illegal", while in the second decision, it in substance absolves it of all taint of illegality. (Finding 9, R. VI, 576; Majority Opinion, R. VI, 584-585; R. XXIV, 2160-2161).

The section 2(d) charges brought against Petitioner and the issues remanded by the Court in connection therewith concern themselves with advertising allowances granted by Petitioner to a retailer doing business in Portland, Oregon and to a wholesaler engaged in business in Boston, Massachusetts. These transactions are essentially trivial and in no way connected with the California Street market (329, Fed. 2(d) 694, 706-707). Petitioner has consistently admitted during these proceedings that these allowances were not given or made available to its other customers in the localities mentioned. The details of these transactions showing that no violations of 2(d) were involved are hereafter set forth.

We now turn to the issues remanded by the Court for resolution by the Commission. To determine whether in resolving these issues, the Commission went beyond the power vested in it by the Court's remand, we will first examine the opinion of the Court and the record to ascertain the nature of the issues remanded and how these arose. This, of course, will entail an ascertainment of the purpose and scope of the Court's remand. Later, in our specifications of errors and argument, we will show

that the Commission erroneously decided the issues thus remanded.

With respect to the price-discrimination charges this Court remanded two issues for resolution. The first of these may be summarized as follows:

Whether there was a causal connection between Petitioner's lower prices to favored buyers on California Street and probable competitive injury to disfavored customers making their purchases of like goods from elsewhere at higher prices.

This issue originated in Petitioner's contention to this Court that there was no such nexus between its discriminations and probable competitive injury, and that for this reason it had not been established that it had violated Section 2(a). In support of this contention, Petitioner pointed to the fact that its discriminatory sales had been made to favored buyers on California Street at the lower prices that tend to predominate there and asserted that the evidence did not show that there was any obstacle, except perhaps business policy, that prevented the disfavored buyers from purchasing at the lower prices prevalent in this market (Petitioner's Brief, pp. 57-58; 100-102; R.V. 427-428). The Court, however, did not pass on this contention because the Commission had not made the required fact findings and had failed also to enunciate the legal principles applicable thereto. Accordingly, the Court remanded the matter to the Commission *to find the facts and to speak as to the application of the law to the facts found* (329 F.2d 703-704). The command of the Court went no further, and nothing in the opinion of the Court suggests that it considered itself to be dealing with an issue only *partially tried* as to the facts and as to which the Commission had evidence not yet presented, nor could the Court entertain such a notion *because the Commission had at no time made the slightest indication that it desired leave to adduce additional evidence relevant to this question* (15 U.S.C. 21 (c)).

The substance of the second issue remanded in connection with the price discrimination case can be stated as follows:

Whether a seller's lower price is within the proviso of Section 2(b) of the Act only if it is made in response to individual competitive demand, and not if made pursuant to a pricing system, such as that represented by the California Street market.

This issue stems primarily from the fact that Commission counsel resorted to alternate legal theories in attempting to frustrate Petitioner's "meeting of competition" defense based on the proviso appended to Section 2(b) of the Act (15 U.S.C. 13 (b)).

Petitioner in presenting this defense to the Commission on its first appeal relied on *undisputed evidence* that established that its lower prices to favored purchasers were made to *meet* the market prices that buyers were paying for goods on California Street, and contended that this evidence brought its discriminations within the exemption created by the proviso (R. V., 426-433; 454-456). Commission counsel *did not dispute* the factual basis of Petitioner's position, but opposed it instead on the following grounds:

(a) The evidence discloses that Petitioner is *meeting lower prices* on California Street pursuant to a discriminatory and illegal two market *pricing system*, and not in response to the lower prices of other sellers in individual competitive situations. Hence, Petitioner is not meeting competition within the meaning of the proviso (R. V., 485-487).

(b) The evidence shows that Petitioner knew or should have known that the competitors' prices it *met* were *unlawful* in that they could not be *cost justified*, and the exemption afforded by the proviso can be claimed only when the *lower prices met* are lawful. Therefore, Petitioner is not meeting competition within the meaning of the proviso (R. V., 487).

It should be noted at this point that the propositions evolved by Commission counsel, although differing as to legal theory, are

both premised on the then *undisputed fact* that Petitioner was engaged in California Street in *meeting* the equally low prices of competitors.

On the first appeal the Commission rejected Petitioner's defense on the basis of the second of the two propositions postulated by its counsel, and did not expressly deal with the question involved in the first. Expanding somewhat on the scope of the proposition it thus adopted, the Commission ruled, in substance, as follows:

The evidence offered by Petitioner does not indicate that the lower prices it *met* can be excused under any of the exceptions of Section 2(a), or that Petitioner had reason to believe that they could be so justified. Since Petitioner had thus failed to prove that these prices were *lawful*, it has not established on the record that it acted in good faith in *meeting* such prices (Commission's Finding 9, R. VI, 576; Majority Opinion, R. VI, 584-585).

It is apparent that to reach this result, the Commission had *first* to have found that the evidence *was sufficient* to establish that Petitioner was engaged on California Street in *meeting* the lower prices of competitors, whether or not the competition that engendered these prices was competition within the meaning of the proviso.

On the first petition for review Commission counsel not only defended the decisional ground adopted by the Commission, but also urged the Court to reject Petitioner's defense on the alternate ground that Petitioner had reduced its prices pursuant to an illegal pricing system and not in response to the lower prices of other sellers in individual competitive situations (Commission's Brief, pp. 6-9; 40-46; 46-59). Considering the alternatives thus tendered this Court logically concluded that it was not required to pass upon questions concerning the duty of Petitioner to adduce evidence as to the lawfulness of competitive prices or as to its knowledge of such lawfulness if, as contended by Commission counsel, Petitioner had reduced its prices in California Street pur-

suant to an illegal pricing system. Considering also that the Commission had not expressly determined whether this market and its operations constituted such a system, this Court ruled that the Commission should deal first with this threshold question on the law and the facts, and therefore remanded the cause to the Commission. In the language of the Court the threshold issue so remanded is "[whether] a lowered price is within the proviso of section 2(b) *only* if it is made in response to individual competitive demand, and *not* as part of the seller's pricing system, such as that represented by the California Street market" (329 F. 2d 705-706, *emphasis added*).

Nothing in the opinion of the Court gives the slightest support to the idea that it felt that the evidence in the record was *insufficient* to enable the Commission to resolve the question thus entrusted to it, or that it was remanding the cause to the Commission for the purpose of redetermining whether Petitioner was engaged in meeting *competition* in California Street. Obviously, the issue that was to be resolved was whether the *competition* that Petitioner, in fact, "*faced* in the California Street market is the *kind of competition* contemplated by the 'meeting of competition' defense of section 2(b)" (329 F. 2d 706; *emphasis added*).

With respect to this issue it is well to note that the Commission at no time sought leave from this Court to adduce additional evidence relevant thereto (15 U.S.C. 21 (c)).

In connection with the proceedings originating in the Complaint in Docket 7496, charging unequal treatment in the granting of promotional allowances in violation of Section 2(d) of the Act this Court's remand encompasses only four issues, which may be stated as follows:

1. *Whether in the Boston, Massachusetts area Central Grocers, Inc., a favored wholesaler, and Standard Grocery Company a disfavored wholesaler, purchased Petitioner's goods of like grade and quality at approximately the same period of time* (329 F.2d 709).

2. *Whether Petitioner in the Boston, Massachusetts area engaged in a course of direct dealing with the retailer customers of Central Grocery, Inc., (329 F.2d 709).*

3. *Whether in the Portland, Oregon area Petitioner engaged in a course of direct dealing with the retailer customers of Hudson House, Inc., a disfavored wholesaler (329 F.2d 709-710).*

4. *Whether in the Portland, Oregon area any of the retail stores of Piggly Wiggly, a subsidiary of Hudson House, Inc, purchased indirectly Petitioner's goods (329 F.2d 710).*

The first of these issues arose as a result of an advertising allowance that Petitioner granted to one of its direct buying customers, Central Grocers, a wholesaler operating in the Boston, Massachusetts area. In 1957 and 1958, Petitioner had an arrangement with Central Grocers by which it ostensibly paid a quarterly sum for an advertising mat in an order guide featuring Central Grocers *private label canned fruits*. The substance of the arrangement, however, was that Petitioner would pay to Central Grocers ten cents per case or \$150 for the *first* 1500 cases of *canned fruits* purchased by it, and an additional ten cents per case for each case of goods thereafter purchased during the year. These payments were made in consideration of supplying Central Grocers' private label *canned fruits*, and in "return for that business and to move that volume of merchandise" (329 F.2d 707). Presumably by reason of this arrangement, Petitioner became during the years in question Central Grocers' supplier of California canned fruits (R. XI 955; 960). The record shows that during the first six months of 1957, Central Grocers purchased 1314 cases of *canned fruits* from Petitioner (Respondent's Ex. 9(d)). The record is entirely silent as to the *grade and quality of the products outside* the canned fruits line, *if any*, that Central Grocers may have purchased from Petitioner during 1957 and 1958. Other direct customers of Petitioner in this area at these times were two retail chains and a wholesaler, none of whom

were offered or granted advertising allowance by Petitioner (329 F.2d 706-707).

Petitioner contended that it had not violated Section 2(d) because there was no substantial evidence to support a finding that its favored and disfavored customers were *actually* competing with each other in the sale and distribution of its goods of *like grade and quality*. In this connection, Petitioner contended that actual competition had not been proven because its products had not been traced to the shelves of any two of its customers whose outlets were in such geographical proximity as to indicate that they were in competition with each other (329 F.2d 708).

The Court rejected this contention and said, in effect, that it is not necessary so to trace the seller's goods of *like grade and quality*; that it is *sufficient to prove* that one customer has outlets in such geographical proximity to those of the other as to establish that the two customers are in *general* competition, "and that the two customers purchased goods of *the same grade and quality*" from the seller within approximately the same period of time, and that upon proof of these basic elements there can be *inferred* that the two customers are in *actual* competition with each other in the sale of the seller's goods. Explaining its ruling, the Court stated that the objectives of Section 2(d), i.e., that sellers deal fairly with their competing customers, "cannot be achieved unless sellers who propose to make such an allowance *assume* that all direct customers who are in *functional* competition in the same geographical area, *and who buy the seller's products of like grade and quality* within approximately the same period of time, are in *actual* competition with each other in the distribution of *these products*" (329 F.2d 708-709; emphasis added).

Having thus laid down the law of the case the Court went on to note that the record showed that Standard Grocery Company, a wholesaler, was the only direct customer of Petitioner in the area that competed with Central Grocers at the same *func-*

tional level, but that nothing in the record called to its attention indicated that these wholesalers had purchased goods from Petitioner during approximately the same period of time, and that for this reason it was not established that these customers were in competition. Adverting, however, to the fact that the record suggested the probability that such purchases could have occurred, the Court said, "If there is presently evidence in the record which would show such proximity as to the time of purchases by Central Grocers and Standard Grocery, or if evidence *is later adduced* showing this, then as to these two customers of Tri-Valley *actual* competition would be established and, as to them a section 2(d) violation would be established" (329 F.2d 709; emphasis added). Accordingly, the Court remanded the matter to the Commission to enable it to call attention to such evidence in the record *or to adduce the same*. Nevertheless, the Court did not thereby relieve the Commission from proving one of the essential elements of the offense twice expressly mentioned in its opinion, i.e., that the generally competing customers *purchased goods of the same grade and quality from the seller*. As to this, it is well to note that on or about April 16, 1957, Standard Grocery purchased 150 cases of *tomato paste* from Petitioner packed under Petitioner's "Corina" label, and that this fill-in, one time purchase is probably the only purchase that Standard Grocery ever made from Petitioner (Com. Ex. 45; R. XI, 975; 978-979; 982-983).

The second and third issues above listed arose because of a ruling by the Court to the following effect:

(a) Section 2(d) is not violated by reason of Petitioner's discrimination in favor of Central Grocers and against the two direct buying retail chains in the Boston area, *unless* the evidence shows that Petitioner engaged in a course of *direct* dealing with the retailer-customers of Central Grocers operating in that area who inferentially were in competition with the outlets of the disfavored chains.

(b) Section 2(d) is not violated by reason of Petitioner's discriminations in favor of Fred Meyers, Inc., a retailer operating in the Portland, Oregon area and against Hudson House, Inc., a wholesaler also operating in the Portland area, *unless* the evidence shows that Petitioner engaged in a course of *direct* dealing with the retailer customers of Hudson House operating in that area who inferentially were in competition with the outlets of the favored retailer.

Applying these principles to the record the Court determined that the evidence did not show that Petitioner had engaged in such a course of direct dealing, and hence remanded the cause to the Commission to enable it to remedy the defects in its proof (329 F.2d 709-710).

The fourth and last issue emerged when Commission counsel asserted that Hudson House, Inc., a wholesaler, was in fact in the retail business, because its wholly owned corporate subsidiary, Piggly-Wiggly, was a retailer (Commission's Brief, p. 11). This assertion caused the Court to consider whether the advertising allowance accorded by Petitioner to Fred Meyer, a retailer, and not made available on proportionately equal terms to Hudson House violated Section 2(d), but determined that the evidence was insufficient to establish such a violation (329 F.2d 709-710, footnote 22). In so doing the Court stated the following:

"No Section 2(d) violation was shown as to the retail operations of Hudson House, if there was such an operation, because it was not shown that any Tri-Valley goods were purchased indirectly by those Piggly-Wiggly outlets during the period in question. This could only have been shown by tracing Tri-Valley to the shelves of those stores by means of the best evidence available" (329 F.2d 710).

Having thus admonished the Commission the Court ordered a remand on this issue to afford the Commission the opportunity to supply the deficiencies in its proof.

The purpose and scope of the remand on the allowance discrimination charges was plainly stated by the Court in the paragraph immediately following its extensive discussion of the legal and factual questions presented. This statement is as follows:

"... we think it appropriate to afford the Commission, on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming, or actual, lack of factual support for the section 2(d) charges *as discussed above*" (329 F.2d 710).

It is clear from the foregoing that the Court did not authorize an unlimited trial *de novo* of the Section 2(d) charges.

The Commission erroneously decided most of the foregoing remand issues entrusted to it adversely to Petitioner. In so doing, the Commission also committed other errors, and the details of these are hereinafter set forth.

ASSIGNMENTS AND SPECIFICATIONS OF ERROR

1. The Commission erred as a matter of law in adducing and considering additional evidence with respect to the two issues remanded in connection with the Section 2(a) charges.

2. The Commission erred as a matter of fact and law in holding that there was a causal connection between Petitioner's discriminations and probably competitive injury to disfavored buyers.

3. The Commission erred as a matter of fact and law when it refused to resolve the second remand issue in accordance with the Court's mandate and relitigated the issue whether Petitioner had actually met the lower prices of competitors.

7. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

4. The Commission erred as a matter of law when it made new findings as to actual direct and indirect competition between Petitioner's favored and disfavored customers.

5. The Commission erred as a matter of fact and law in holding that the payments to Fred Meyer, Inc., and Central Grocers, Inc. violated Section 2(d) of the Act.

6. The Commission erred in failing to frame its order in terms which bear a reasonable relationship to the practices alleged to be unlawful.

ARGUMENT

1. The Commission Received Further Evidence on the Two Price Discrimination Issues Remanded. The Commission Was Without Power to Receive or Consider Such Evidence, and Accordingly the Same Should Be Disregarded.

On November 23, 1964, a prehearing conference was held before the Commission's Examiner (R. XIX, 1575). At the outset, the Examiner declared that hearings in the case, "*pursuant to instructions of the Court of Appeals* had been delayed so that counsel would have the opportunity of making further investigation and attaining further evidence which the Court of Appeals seemed to contemplate in the event the record, as it stood, was insufficient to resolve the issues raised by the Court of Appeals in accordance with the remand" (R. XIX, 1576).

Having thus summarized his version of the purpose of the remand, the Examiner went on to state, in effect, that in his view the record, as it stood, was insufficient to resolve the issues remanded (R. XIX, 1578).

In connection with the first issue that arose from the price discrimination charge, i.e., whether there was a causal connection between Petitioner's discriminations and alleged injury to competition, the Examiner asserted that in his opinion the evidence in the record was insufficient for the resolution of this issue, and ruled that Commission's counsel had the burden of producing the

additional evidence required to cure this defect (R. XIX, 1581; 1584).⁸ Clearly at this point, it was evident that the Commission had failed to establish that Petitioner's discriminations were the proximate cause of competitive injury, and absent leave to adduce additional evidence, the Examiner should have dismissed the 2(a) charges.

As to the question of law involved in the second issue which arose from the price discrimination charge, i.e., whether a lower discriminatory price is protected by the "meeting of competition" proviso only if it is made in response to an individual competitive demand, the Examiner declared that in his view the evidence in the record was also insufficient for the resolution of the issue, and decided that Petitioner's counsel had the burden of adducing the additional evidence necessary to remedy this flaw (R. XIX, 1581).

The record indicates that the Examiner was of two minds regarding the sufficiency of the evidence proffered by Petitioner regarding the second issue at the hearings held prior to remand. He declared first, as has been mentioned above, that Petitioner's evidence was inadequate, but then he went on to say that at the hearings to be thereafter held, he would be willing to receive evidence from Commission's counsel by way of *rebuttal* (R. XIX, 1581-1583). In this connection, it should be observed that Commission's counsel was given ample opportunity to adduce *rebuttal* evidence when the case was first submitted to the Examiner, but failed to avail himself thereof (R. XVIII, 1558), and that at no time thereafter did he solicit leave from the court for this purpose.

In any event, Commission counsel subsequent to the pre-hearing conference adduced oral and documentary evidence with respect to the two remand issues involved in the price discrimination issues.

8. The ruling that Commission's counsel had the burden of proof on this issue was correct. *Alexander v. The Texas Company*, 165 F.Supp. 53, 58 (D.C.W.D. La. 1958); *Youngson v. Tidewater Oil Company*, 166 F. Supp. 146, 147 (D.C. Or. 1958).

Some of this evidence, not all, was received over the objection of Petitioner. Petitioner expressly objected to the further cross examination of its only witness four years after he had first testified. This objection was based on the ground that the case had not been remanded for the purpose of further cross examining this witness (R. XXVII, 2460-2461).

The oral and documentary evidence thus received which was considered by the Commission in arriving at its second decision is the following:

- (a) Testimony of Walter Tewes (R. XXV, 2208-2230);
- (b) Testimony of Samuel Arshan (R. XXV, 2230-2253);
- (c) Testimony of Walter Rohrs (R. XXV, 2254-2269);
- (d) Testimony of Russell Snyder (R. XXVII, 2418-2478);
- (e) Commission Exhibits Nos. 223, 225.

Messrs. Tewes, Arshan and Rohrs were representatives of unfavored wholesalers doing business in Manhattan and New Jersey. The tenor of the testimony of Tewes and Arshan was, in part, that they had never heard of the California Street market or of California Street prices. The tendency of the testimony of the third witness, Mr. Rohrs, was that he had heard rumors about California Street prices and that his recollection did not go beyond that point. On the basis of this evidence, the Commission concluded, in effect, that no prospective purchaser, including all of Petitioner's disfavored purchasers, could have informed themselves "as to the 'general price level' in California" (R. XXIV, 2155).

Mr. Snyder testified, in substance, on cross-examination, that anyone could buy merchandise on the general market levels as cheaply as in California Street anywhere in the country, and that information regarding prices quoted on California Street could be obtained through various sources. The Commission compared this testimony with some given by Mr. Snyder prior to remand and

concluded, as did the Examiner, that there was no California Street market price (R. XXIV, 2151-2155). Commission Exhibits Nos. 223 and 225 were used to establish to the Commission's satisfaction that the prices quoted by Petitioner to two large chains were not available to the disfavored purchasers (R. XXIV, 2156-2157).

It has been noted before that neither of the parties requested leave from this Court to adduce additional evidence concerning the price discrimination issues as required by the provisions of 15 U.S.C. 21(c). This being so, both parties were precluded from producing any such evidence. Moreover, as has been pointed out previously, there is nothing in the opinion of the Court, incorporated by reference in its mandate,⁹ that expressly or by fair implication authorizes either party to submit such evidence for consideration either in first instance or on review. Under such circumstances, the rule must be applied that the Commission, as an inferior tribunal, was without power, i.e., jurisdiction, to receive this evidence even though Petitioner failed to object for the most part to its introduction. This is the teaching of *Zdanok v. Glidden Co.*, 327 Fed. 2(d) 944, 949-950 (2 Cir. 1964) cert. denied 377 U.S. 934, 12 L. Ed. 298 (1964).

This being a matter of jurisdiction and not of procedure, the price discrimination issues have returned to this Court on review in virtually the same evidenciary posture as at the time of its first decision (*Zdanok v. Glidden Co.*, supra, concurring opinion of Chief Judge Lumbard, p. 957).

Accordingly, no inferences favorable to the Commission's findings and decision may be drawn from the evidence thus unlawfully received and the whole thereof should be disregarded.

9. *Federal Home Loan Bank of San Francisco v. Hall*, 225 Fed. 2(d) 349, 380-381 (9 Cir. 1955).

2. There Is No Causal Connection Between Petitioner's Lower Prices to Favored Buyers on California Street and Probable Competitive Injury to Disfavored Customers.

In deciding the first remand issue against Petitioner, the Commission ostensibly concluded that there was a causal link between Petitioner's discriminations in the California Street market and probable injury to competition because the "lower prices quoted by respondent to certain favored chains were not in fact *available*"¹⁰ to the disfavored customers" (R. XXIV, 2158).

The Commission's opinion reveals, however, that the causal link between any probable injury to competition was the prevailing method of doing business in California Street, and that any such injury would occur whether or not Petitioner sold any goods in that market. In this connection it should be borne in mind that the Commission has categorically stated that the record does not show that Petitioner and its competitors "were selling pursuant to a system of the type condemned" in the cases cited by its counsel (R. XXIV, 2160).

The inferences *drawn by the Commission* from the record and probably from the findings of Subcommittee No. 5 lead inevitably to the conclusion that it was the mode of doing business in this market and not Petitioner's conduct that was responsible for any competitive disadvantage visited upon the disfavored buyers.

The Commission first inferred that the "California Street market is not a regular exchange and * * * * it apparently is no more than a location for *individual* buyers—mostly chain stores—who enter into their own private agreements with various California canners" (R. XXIV, 2155). Granting the validity of this inference it is noteworthy that the Commission has not condemned as illicit the method of doing business in this market even though the prices set by individual negotiations between many sellers and buyers are not open and notorious.

10. The Commission's view is that a price is *available* only if it is voluntarily and affirmatively quoted or offered by the seller to the prospective purchaser (R. XXIV, 2156 and footnote 2; 2158).

Second, it inferred that Petitioner's "lower prices were tailored to the requirements or demands of the favored chains" (R. XXIV, 2157). This inference was drawn, as the opinion of the Commission indicates, from testimony describing the long established method followed by Libby McNeill & Libby (one of several canners offering its wares on California Street) in bargaining with Safeway for the sale of its products, and it is remarkable that the Commission did not pronounce unlawful Libby's practice of meeting or *beating* the prices offered Safeway by competitors (R. XV, 1316-1319).

The practices thus described, according to Commission doctrine, tend to result in injurious discrimination, and hence it is significant that the Commission did not find that the prices set on California Street by such individual and private agreements were voluntarily quoted or offered by Petitioner's competitors to customers located elsewhere. The reason for this may be that these prices were solely the result of the strong economic pressure that only the large chains could exert in bargaining with the various California canners, and accordingly it might not be rational to find that these prices were made available to other buyers. While we have merely suggested that this might be the reason that no such finding was made, the Commission's further inferences most clearly indicate that it was. These further inferences are to the effect that the lower prices so obtained were "clearly a result of the buying power of the chains, and it would be wholly unrealistic to hold that such prices were available to smaller purchasers," because individual negotiations with the various canners would not be practical for the smaller independents and many wholesalers as they "are not equipped and do not have the resources to bargain on the same footing as the large chains"¹¹ (R. XXIV, 2158). In the face of

11. The invalidity of this proposition becomes apparent when it is considered that there is *no evidence* in the record showing that any disfavored buyer attempted to obtain prices lower than those originally quoted and was refused.

the circumstances so categorically stated by the Commission it would be entirely unrealistic for the Commission itself to presume that all or a majority of the canners selling on California Street, *except Petitioner*, could, would or did make available to other purchasers the lower prices agreed upon in individual negotiations with the large chains.¹² Therefore, in the absence of the finding to which we have adverted and of evidence that might support it, it follows that the direct and proximate cause of probable injury to competition was the system of doing business on California Street and not Petitioner's discriminations since the disfavored customers would be in any event confronted with the lower prices accorded the chains by the other canners with or without petitioner's price differentials. See Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), Sec. 8.5, p. 194. In this connection it should be remembered that the Commission did not find that Petitioner was primarily responsible "*for the low 'California Street' prices,*" and merely *conjectured* that it might have been (R. XXIV, 2162). Accordingly, Petitioner's prices contributed nothing to a competitive situation in the Street that the Commission has now found to be wholly untainted by illegality (R. XXIV, 2160). See Rowe, *supra*, Sec. 8.5, p. 194, footnote 92.

In disposing of this first issue, the Commission also committed a grave error. It ruled as a matter of law that the nonfavored purchasers are not required to keep abreast of market quotations or seek out by bargaining the lowest prices and, further, that sellers are required by virtue of the broad design and purpose of section 2 (a) voluntarily to offer (make available) to apathetic or uninformed buyers the same prices secured through haggling and bargaining by energetic and knowledgeable purchasers. In so doing the Commission relied on concepts of equal availability

12. Moreover, in its prior decision the Commission found as a *fact* that Petitioner "knew, or should have known, the lower prices of its competitors were discriminatory . . ." (R. VI, 576).

germane to section 2 (d) and (e) which apply even in the absence of demonstrable competitive injury, and said in attempting to justify such action that to "construe the Act so as to require bargaining as a basis of price equality would be to deny the protection of the Clayton Act to the small customers." (R. XXIV, 2158). The proposition thus stated by the Commission rests entirely on the false assumption that a large number of purchasers "are not equipped and they do not have the resources to bargain on the same footing as the large chains" (R. XXIV, 2158). This is a false assumption that cannot achieve the dignity of substantial evidence because there is absolutely nothing in the record of this cause that shows that any disfavored buyer ever attempted to obtain by bargaining or any other method prices lower than those originally quoted. Moreover, there is nothing in common experience that indicates that bargaining by smaller purchasers would be futile.

The error thus committed is further made evident by the legally established fact that the antitrust laws, including the Act, definitely permit sturdy bargaining between buyers and sellers. *Automatic Canteen Co. v. Federal Trade Commission*, 341 U.S. 61, 73-74, 94 L ed. 1454, 1463 (1953); *Forster Mfg. Co. v. Federal Trade Commission*, 335 F 2d 47, 55-56 (5 Cir. 1964). The reason that scope for such bargaining is allowed by these laws is that it is a necessary concomitant of the trading done in imperfect markets. The nature and incidents of this economic phenomenon are well illustrated by the following statement:

"Second, under conditions of imperfect markets, haggling by the buyers for special price concessions or deals constitutes an integral part of the competitive process. Because of time lag in the spread of information about prices charged or relative inertia of some buyers in seeking out possibilities of special deals, or for other reasons such as seller's expectation of future business, certain buyers may be more effective than others in obtaining price reductions. Imposing severe

limitations on the businessman's freedom to *cheer* such deals, because of the possibility that a particular competitor of his may be harmed as a result of price discrimination may lead to curtailment of price competition. "The effort to buy as cheaply as possible is an essential feature of competition; and except in a perfect market it is not to be expected that all buyers will obtain their supplies at the same price," states the former Chief Economist of the Federal Trade Commission. (Corwin Edwards, *Maintaining Competition*, p. 163". Burns, *A Study Of The Antitrust Laws* (1958), pp. 139-140.

The fallacies inherent in this ruling of the Commission are also further exposed by the testimony adduced at the hearings held before Subcommittee No. 5, which discloses that prices current in California Street are well known in other markets throughout the country and do not always originate in the street. (Testimony of Mr. House, hearings before Subcommittee No. 5, Part II Vol. 1, p. 744; testimony of Mr. Corbus, *id.*, pp. 608-609.)

In view of the foregoing, it is submitted that there is no substantial evidence or sound law to support the finding of the Commission that Petitioner's discrimination were the proximate cause of probable injury to competition.

3. The Commission did not resolve the second remand issue in accordance with the Court's mandate, and while disregarding the mandate it relitigated an issue which had been originally decided in Petitioner's favor.

The Commission did *not* resolve the second remand issue of the price discrimination case as framed by this Court. It avoided resolving this issue by a misconception of the Court's instructions and thereby reintroduced into the litigation questions which it had settled by its first decision in Petitioner's favor. The Court's direction was that the Commission resolve the threshold question of *law* whether a lowered price is within the proviso of Section 2(b) "*only if it is made in response to an individual competitive demand, and not as part of the Seller's pricing system, such as that*

represented by the California Street Market" (329 F. 2d 706). The Commission, in substance, translated this direction to mean that the Court had instructed it to determine (1) whether the *evidence* establishes that either Petitioner or its competitors on California Street were selling pursuant to a pricing system or an illegal pricing system; (2) whether Petitioner as a matter of law could reduce its prices to meet the lower prices of its competitors even if these were using a formal pricing system, and (3) whether Petitioner adduced evidence sufficient to show that as to each discrimination Petitioner, as a reasonable and prudent person, *exercised reasonable diligence* in verifying the existence of a lower price of a competitor, and thereby established that its lower prices were made in response to individual competitive demand (R. XXIV, 2160-2161).

The Commission resolved the first two branches of the remand issue it had thus contrived for itself, in substance, as follows:

The record does not support a finding that either Petitioner or its competitors were selling pursuant to a pricing system or an illegal pricing system, and, aside from the question whether Petitioner "was meeting *unlawful prices* or had reason to believe it was doing so," Petitioner "could as a matter of law reduce its prices in *individual transactions* to meet the lower prices of its competitors . . . *even if the latter were using a formal pricing system*" (R. XXIV, 2160).

This ruling enabled the Commission to avoid the necessity of dealing with the legality of the California Street market on an industry-wide scale and established the basis for issuing a cease and desist order against Petitioner *alone*.

The Commission found it more difficult to find an answer to the third branch of its issue for the reason that the question whether Petitioner exercised *diligence* in meeting prices, regardless of their *legality*, had been, in effect, finally decided in Petitioner's favor by the Commission during the first round of litigation, and on principles akin to *res judicata* could not again be

litigated. *United States v. Utah Construction and Mining Company*, 384 U.S. 394, 420-422; 16 L. ed 2d 642, 669-671 (1966). This can be shown by examining the factual and legal grounds on which the Commission based its rejection of Petitioner's 2(b) defense in the first instance. These may be summarized as follows. The buyers represented on the California Street market "*are usually paid less for the packers' products than buyers that purchase in other markets.*" Although the *opening* prices are ordinarily announced by the packers in this market, almost invariably the "market price" is established below the range of *opening prices*, and "goods are not sold in appreciable volume unless the *prices* are satisfactory to the buyers." Notwithstanding the Petitioner "*was aware of all these facts* and therefore knew, or should have known, that the *lower prices* of its competitors were *discriminatory*, it did not adduce evidence to show that it had reason to believe that such *prices* were *lawful* (Commission's Finding 9, R. VI, 576; Majority Opinion R. VI, 584-585). The facts thus epitomized were drawn by the Commission from testimony proffered by Petitioner and therefore there is implicit in the *awareness* so attributed by the Commission to Petitioner the notion that it had exercised due care in ascertaining conditions in the market including competitors prices, and logically the Commission need not and could not reach the question of the lawfulness of competitors prices without first deciding the issue of diligence in favor of Petitioner. Certainly, the issue of lawful prices became "immaterial" if the Commission had found that Petitioner had been negligent. Moreover, it is not possible to assume that the Commission overlooked the issue whether Petitioner had been negligent because Petitioner pointedly brought it to his attention when it stated in its brief on appeal that the *record* disclosed "that in all sales made in this market to its alleged favored buyers respondent zealously scrutinized the prices of its competitors before reducing the prices to meet the market price (i.e., the individual prices of one or more competitors)" (R. V. 432-433). This statement was repeated in

Petitioner's brief on the first petition for review, and there Petitioner asserted, "The Commission has never questioned the foregoing statement, and, accordingly, the facts therein summarized are uncontradicted and unchallenged" (Petitioner's Brief, pp. 58-59). The Commission and its counsel did not take exception to these positive and unambiguous declarations at any stage of the proceedings and the reason for this must be that they were convinced that this relevant and essential issue had been finally decided on the basis of the *record* in Petitioner's favor. (Commission's Brief, p. 45, footnote 21). Finally, if the Commission had felt that there were any infirmities in Petitioner's evidence and in the conclusions drawn therefrom by the Court, the Commission had ample time following the judgment of the Court to apply for a rehearing wherein any such deficiencies could have been called to the attention of the Court.

Confronted with these circumstances the Commission was compelled to assert that it had made a substantive error in giving any consideration whatsoever to Petitioner's evidence, and this it did when it said "there is *nothing* in the record to show that respondent's lower discriminatory prices were made in self defense in response to competitors' prices or offers" (R. XXIV, 2162).

To justify this position in view of its prior fact findings the Commission went on to fashion an inflexible rule, seemingly based on the primitive testimonial views of the ecclesiastical courts, to the effect that a 2(b) defense may not be accorded any consideration unless the seller adduces certain *indispensable corroborating evidence*. IV Wigmore, Evidence, Sec. 2032, pp. 291-293 (2 Ed. 1923). The Commission's statement of the rule thus evolved is as follows:

"*General testimony* to the effect that price discriminations were made to 'meet competition' *without* documentation or specific evidence, *is never sufficient to support a finding* that a lower price was 'made in good faith to meet an equally low price of competitor'" (R. XXIV, 2163).

Obviously, the application of this fixed rule of thumb deprives the Commission of discretion in the estimation of the worth and weight of evidence, but in this case it serves purposes which the Commission deems desirable. First, it enables the Commission in its second decision to reject Petitioner's general testimony *in toto* because it is not synthesized with documentation or specific evidence, thus leaving Petitioner's case a *blank* so far as evidence upon its 2(b) defense is concerned. IV Wigmore Evidence, Section 2030, pp. 289-290 (2 Ed. 1923). Second, on this petition for review it permits the Commission to assert that it grossly erred when it found in the first instance that Petitioner exercised due care and that this finding is not binding upon it because it is based on evidence which as a matter of law it was bound not to consider. Third, it enables the Commission on review to contend that the Court remanded the cause to afford it the opportunity to correct this error by reexamining Petitioner's evidence to determine whether it meets the basic requirement of the rule thus enunciated in its second decision. With respect to all this it should be noted that the Commission cautiously pretends that this rule is sanctioned by the Supreme Court's decision in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 89 L. Ed. 1938 (1949) (R. XXIV, 2163). Cf. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F.2d 47, 55-56, *supra*.

In any event the Commission, applying this principle, rejected the testimony of Petitioner's entirely competent and credible witness without any estimation of its worth and held that Petitioner's evidence was not sufficient to show that Petitioner had exercised diligence in verifying the existence of a lower price of a competitor (R. XXIV, 2163). It can be seen therefore that by this device the Commission evaded the duty of resolving the issue of law remanded by the Court, and relitigated a fact question which it had therefore decided in Petitioner's favor.

The Commission's disregard of the Court's mandate on this issue justly merits the following comment which appears in the dissenting opinion of Commissioner Elman:

"The Commission's present disposition of the case does more than make the remand from the Court of Appeals an exercise in futility" (R. XXIV, 2178-2179).

At the time this case was decided by the Commission Section 6(a) of the Administrative Procedure Act provided that, "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." [5 U.S.C. 1005(a)]. The relitigation of the issue whether the petitioner had met competition in California Street under the circumstances herein exhibited constitutes a grave breach of the command of this statute. Accordingly, this Court should not only hold that the Commission is estopped from relitigating this issue, but should also set aside the 2(a) charges without any further remand for any purpose to the Commission.

4. The Commission Made New Findings Regarding the 2(a) Charges Without Authority of This Court.

Having thus disposed of petitioners "meeting of competition" defense, the Commission went on to sanction new and numerous findings made by the Examiner with respect to actual direct and indirect competition between the favored and disfavored buyers of petitioner's goods in connection with the price discrimination charges (R. XXIV, 2167-2168). This the Commission did notwithstanding petitioner demonstrated that these findings were inconsistent with the Commission's prior findings approved by this Court, and that this Court had *not* in remanding the cause directed the making of such new and unnecessary additional findings (R. XXII, 1992-1995). Indeed, the opinion of the Court clearly shows that it ruled that no such additional findings were required to sustain the Commission's cease and desist order relating to the Section 2(a) charges (329 F.2d 702). Consequently, these new findings should be vacated thereby relieving the Court of the

fruitless and *delaying* task of reviewing an extensive record for a *second* time to determine whether there is evidentiary support therefor. As to this it should be observed that the re-litigation of the issue once settled by a reviewing court hinders the expeditious disposition of causes. *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532 (7 CIR. 1953). Among the new and unnecessary findings sanctioned by the Commission is one whereby the Examiner found that the petitioner had discriminated in price against Hudson House by reason of the allowance it gave Meyer in connection with the coupon program (R. XXII, 1884; XXIV, 2168). The Commission in approving this finding entirely ignored that the coupon redemption feature of this allowance was presented by its counsel to this Court as an integral part of a genuine advertising and promotional allowance granted in consideration of services actually rendered, cognizable therefore *only* under Section 2(d), and that this Court was thereby persuaded so to deal with it. (Commission's Brief, pp. 18-21; 59-60; 62; 329 F.2d 706-708). It is well to bear in mind that by this action the Court, in effect, upheld the Commission's findings that the allowance was given in consideration or as compensation for services furnished in connection with the sale or offering for sale of products sold by Petitioner, and not to facilitate the original sale as contended by Petitioner (329 F.2d 708). It is also well to recall that Commission counsel have never contended in this Court *in this case* that the relationship between the free goods given Meyer upon the redemption of the coupons was so disproportionate as to render this component of the promotion a price discrimination cognizable under Section 2(a). Cf. *Fred Meyer Inc. v. Federal Trade Commission*, 359 F.2d 351, 361-362 (9 CIR. 1966). Accordingly, the decision of this Court on this point is the law of the case and the Commission was without authority to make a finding contrary thereto. *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532, *supra*.

5. There Is No Factual or Legal Support for the Commission's Findings That Petitioner Violated Section 2(d).

The Commission approved in their entirety the Examiner's findings to the effect that Petitioner had violated Section 2(d) of the Act (R. XXIV, 2164, 2167). These findings and the errors inherent in them are hereinafter discussed.

The Examiner decided the first issue—the one involving the advertising allowance to Central Grocery in Boston—against Petitioner for the reason that Standard Grocery and Central Grocery purchased goods from it, at approximately the same period of time. In doing this, the Examiner deemed it irrelevant that the goods purchased by Standard Grocery were not of the same grade and quality as those purchased by Central Grocers because according to his conception of the arrangement between Petitioner and Central Grocers the allowance was given to “promote” Petitioner’s “*general line* of products” in Central Grocers’ order guide (R. XXII, 1902-1903). This is, of course, contrary to the evidence which shows that the payments were made on the number of cases of canned fruits purchased, and conflicts with the law of the case (329 F.2d 707; 708-709).

While so resolving this issue, the Examiner also found that Petitioner had discriminated against another wholesaler in the area, although the goods purchased by this wholesaler were not of the same grade and quality as those purchased by Central Grocers (R. XXII, 1901-1902). This finding has the same factual and legal infirmities as the one made in connection with Standard Grocery. Moreover, the mandate of the Court did not authorize the Commission to adduce further evidence regarding other wholesalers who were not accorded an allowance. *Zdanok v. Glidden Co.*, 327 Fed. 944, *supra*.

Finally, the Examiner likewise found that Petitioner had discriminated against Safeway Stores, Inc., in Portland, Oregon, because it had not made available to this chain the allowance given to Fred Meyer to promote the sale of its peaches although the

record plainly shows that these customers did not buy Petitioner's promoted products at approximately the same time and despite that there is *no evidence* showing that market conditions had remained essentially the same during the period that elapsed between Safeway's *last* purchase made on April 1, 1957, and Fred Meyer's promotional campaign which began on September 25 of that year (R. XXII, 1889-1890; Com. Exhs. 10; 33). Cf. *Fred Meyer Inc. v. Federal Trade Commission*, 359 F.2d 351, 357, *supra*. In addition, there is nothing in the mandate of the Court that authorized the Commission to produce additional evidence with respect to another retailer who was not accorded an allowance. *Zdanok v. Glidden Co.*, *supra*.

In view of the foregoing, it is submitted that the Commission's order regarding the Section 2(d) charges should be set aside. No evidence was adduced with respect to the other issues remanded in connection with the Section 2(d), and hence no findings were made.

6. The Broad Breadth and Scope of the Commission's Order Exceeds the Legitimate Needs of the Case, and, Is, Therefore, Erroneous.

With respect to the breadth and scope of the Commission's order, petitioner relies on the contentions made in his first brief herein (Brief for Petitioner in Docket 18125, pp. 165-166).

CONCLUSION

For all of the reasons herein set forth above, Petitioner prays this Honorable Court to set aside the order of the Commission.

Dated, San Francisco, California, May 23, 1968.

Respectfully submitted,

FRANCIS KERNER,
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those Rules.

RICARDO J. HECHT,
Attorney for Petitioner.

No. 21237 B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A.M.R., Inc., et al.,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,

Appellees.

Opening Brief on Appeal of Appellant
Laguna Federal Savings and Loan Association

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MAT 19 1967



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IN THE
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Opening Brief on Appeal of Appellant
Laguna Federal Savings and Loan Association

Appellant Laguna Federal Savings and Loan Association hereby adopts as its opening brief on appeal the opening briefs being filed concurrently by Messrs. McKenna & Fitting on behalf of a large number of appellants in Nos. 21231 *et seq.* and 21237 A on the files of this Court.

Respectfully submitted,

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Laguna Federal Savings and
Loan Association



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BENNETT W. PRIEST

Attorney for Appellant



NO. 21339

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE JOSEPH,
Petitioner and Appellant,
v.
JOHN H. KLINGER, et al.,
Respondents and Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

APPELLEE'S BRIEF

FILED

FEB 1 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE JOSEPH,

Petitioner and Appellant,

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Respondents and Appellees.

NO. 21339

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

In an information filed by the District Attorney of the County of San Joaquin, appellant was charged with violation of section 23105 of the California Vehicle Code (driving while addicted to or under the influence of narcotics). (Rep. Tr. pp. 6-7.)^{1/} Appellant admitted the nine prior felonies charged against him in the information. (Rep. Tr. p. 3.) The jury returned a verdict of guilty. (Rep. Tr. pp. 132-33.) No notice of appeal was filed, timely or otherwise.

1. References to the reporter's transcript in the state trial court will be as indicated above.

Thereafter appellant filed a petition for writ of error coram nobis in the Superior Court of the State of California, in and for the County of Joaquin, which was denied on July 20, 1965. A petition for writ of habeas corpus was filed in District Court of Appeal of the State of California, Second Appellate District, which was denied on December 7, 1965. (Tr. of Rec. p. 6.)

B. Proceedings in the Federal Courts

On February 18, 1966 appellant filed a petition for writ of habeas corpus in the United States District Court, Central District of California, Leon R. Yankwich, Judge.^{2/} (Tr. of Rec. p. 3.)

The District Court appointed appellant's present counsel and then denied the petition on August 2, 1966. (Tr. of Rec. p. 35.) A Certificate of Probable Cause to appeal was granted by the District Court and a notice of appeal was filed. (Tr. of Rec. pp. 36-37.)

STATEMENT OF FACTS

During the early morning hours of November 30, 1963, Stockton Police Officers Wingo and Tribble were on routine patrol. At the intersection of Washington and Madison Streets they observed a car pass by at a high rate of speed. (Rep. Tr. pp. 12-13.)^{3/} The officers pursued the car and observed it

2. At that time United States District Court Southern District of California, Central Division.

3. No evidentiary hearing was held in the District Court. However, the record of the proceedings in the state trial court was before the District Court and this statement of facts is taken therefrom.

weave back and forth. With the use of the police car's red lights the car was brought to a halt. (Rep. Tr. p. 14.)

Appellant, the driver of the car, got out of his car as the officers got out of the patrol car. Officer Wingo noticed that appellant was unsteady on his feet and his cap was cocked off to one side. (Rep. Tr. p. 15.) Officer Wingo observed that appellant did not appear to be his normal self.^{4/}

Officer Wingo smelled appellant's breath but was unable to detect any alcoholic odor. (Rep. Tr. p. 16.) Appellant's arms had puncture wounds which appeared to be those of an addict. (Rep. Tr. pp. 17-19.) Officer Wingo asked appellant if he had taken an injection of narcotics the previous evening. Appellant stated that he had taken such an injection a month or so ago. (Rep. Tr. p. 19.)

The officers then took appellant to the police station for an examination by a physician. (Rep. Tr. p. 19.) Officer Wingo questioned appellant further and he admitted that he had had an injection that night. (Rep. Tr. p. 20.) Officer Roop called Dr. Buckingham to examine appellant.

Mr. Howard W. Roop, a Stockton police officer assigned to the Narcotics Detail, was present in the police station when appellant was brought in. Officer Roop stated to appellant, "Well, it looks like you are really strung out." ("Strung out" means addicted to narcotics.) Appellant made no reply. (Rep. Tr. pp. 73-75.)

Officer Wingo then said to Officer Roop in appellant's

4. Officer Wingo had numerous conversations with appellant in the past. (Rep. Tr. p. 16.)

presence that "Mr. Joseph, or Joe-Joe had admitted that he had taken a 'fix' earlier that evening." Appellant made no statement at this time. (Rep. Tr. p. 76.)

James H. Buckingham, M.D., received a call during the early morning hours of November 30, 1963, from the Stockton Police Department to come to the police station and examine an individual. (Rep. Tr. pp. 47, 52.) At the station Dr. Buckingham examined appellant's arms. He found in excess of 25 puncture marks on the right arm, at least one of which was less than several hours old. The left arm had approximately 10 puncture wounds over the veins. (Rep. Tr. p. 53.)

Dr. Buckingham asked appellant if he wished to take a "Naline" test and appellant said "No." When he asked appellant if he had used narcotics that night appellant said that he would rather not make a statement. (Rep. Tr. p. 54.) In Dr. Buckingham's opinion appellant was under the influence of a narcotic at the time of his examination and was addicted to narcotics. (Rep. Tr. p. 59.)

APPELLANT'S CONTENTIONS

Appellant contends:

1. That appellant was denied counsel at all times prior to arraignment with the result that inculpatory admissions were admitted into evidence.

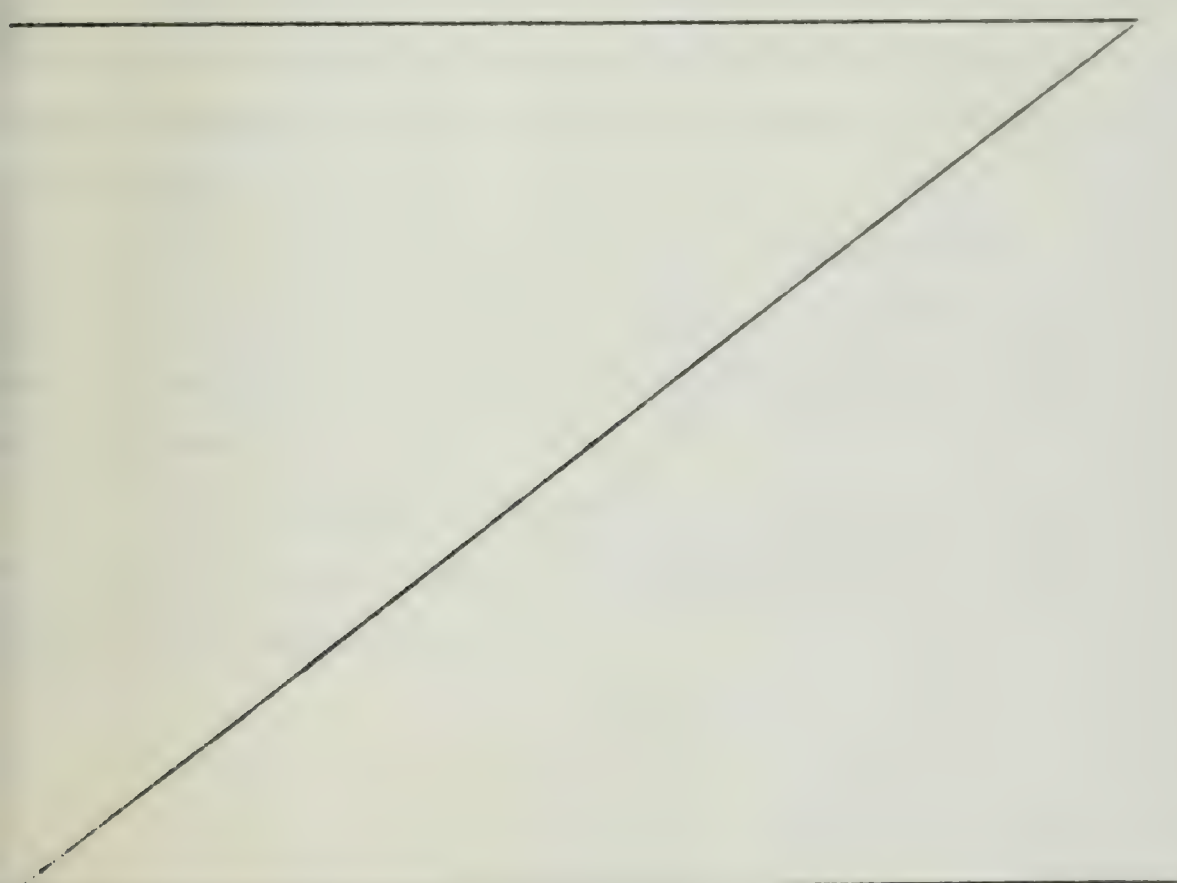
2. That appellant's privilege against self-incrimination was violated by the prosecutor's comment to the jury on appellant's failure to take the stand in his own defense and by the trial court's instructions to the jury on the inferences which could be drawn by the jury from appellant's failure to

take the stand.

3. That appellant was deprived of adequate representation at trial in that his counsel did not advise him of his right to appeal and did not adequately prepare himself for trial so as to be able to provide effective aid of counsel.

4. That conviction and incarceration in the state prison of appellant for driving an automobile while under the influence of narcotics is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

5. That appellant was deprived of a fair trial in that the trial court failed to give adequate instructions to the jury on what constitutes addiction to narcotic drugs.



SUMMARY OF APPELLEE'S ARGUMENT

1. Appellant's claim as to violations of his right to counsel guaranteed him by the Sixth Amendment of the United States Constitution are barred by the decision of the Supreme Court of the United States in Johnson v. New Jersey, 384 U.S. 719 (1966).

2. Appellant's claim as to violations of his right to remain silent guaranteed him by the Fifth Amendment of the United States Constitution are barred by the decision of the Supreme Court of the United States in Tehan v. Shott, 382 U.S. 406 (1966).

3. Appellant's counsel at trial gave adequate representation and in no manner was appellant deprived of the aid of counsel at trial.

4. The conviction of appellant for driving an automobile while under the influence of narcotics is not cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

5. The court's instructions on the question of addiction while not correct in light of current California law were not so inadequate so as to raise a federal question justiciable in this court.

6. Appellant received a fair trial within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution.

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/

6.

ARGUMENT

I

APPELLANT'S CLAIM OF VIOLATIONS
OF HIS RIGHT TO COUNSEL GUARAN-
TEED HIM BY THE SIXTH AMENDMENT
OF THE UNITED STATES CONSTITUTION
MAY NOT BE RAISED ON A COLLATERAL
ATTACK AS THE TRIAL COMMENCED BE-
FORE JUNE 13, 1966

Appellant claims that he was denied his right to counsel in violation of the Sixth Amendment of the United States Constitution. (App. Op. Br. p. 9.) In support thereof he cites Escobedo v. Illinois, 378 U.S. 478 and Miranda v. Arizona, 384 U.S. 436. Appellant concedes that his conviction was final before the decision of Escobedo on June 22, 1964. (App. Op. Br. p. 19.) This brings the case squarely within the rule pronounced in Johnson v. New Jersey, 384 U.S. 719, which held Escobedo to be effective in trials commencing after June 22, 1964 and Miranda to be effective in trials commencing after June 13, 1966.

While appellant criticizes the Supreme Court's non retroactivity cases as being a ". . . mass of contradictions and radical departures from constitutional theory. . ." he is able only to cite Mr. Justice Black's dissenting opinion in Linkletter v. Walker, 381 U.S. 618, 640 as authority for that position.

Appellee, on the other hand relies on the decision of that Court in Johnson v. New Jersey, supra, for its position.

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II

APPELLANT'S CLAIM OF VIOLATION
OF HIS RIGHT TO REMAIN SILENT
GUARANTEED HIM BY THE FIFTH
AMENDMENT OF THE UNITED STATES
CONSTITUTION MAY NOT BE RAISED
ON COLLATERAL ATTACK AS THE
JUDGMENT WAS FINAL PRIOR TO
APRIL 28, 1965, THE DATE OF
GRIFFIN v. CALIFORNIA

Appellant contends that his right to remain silent was violated by the prosecutor's argument and the trial court's instructions to the jury commenting on his failure to take the stand in his own defense. (App. Op. Br. p. 13.)

In Tehan v. Shott, 382 U.S. 406, the Supreme Court has refused to give retroactive effect to its decision in Griffin v. California, 380 U.S. 609. We submit that Tehan is controlling on this issue of this case.

III

APPELLANT WAS IN NO MEANS
DEPRIVED OF AID OF COUNSEL
AT THE TIME OF TRIAL

Appellant next contends that he was deprived of the effective aid of counsel at trial. (App. Op. Br. p. 17.) Appellee contends that the record reveals a vigorous and effective presentation by appellant's trial counsel. As appellant now concedes^{5/} his trial counsel did cross examine the witnesses called by the People and then called two witnesses in support of appellant's defense. Contrary to appellant's contention, a brief perusal of the transcript will reveal a vigorous, spirited and imaginative

5. App. Op. Br. pp. 17-18.

defense conducted by the Public Defender of San Joaquin County.^{6/}

In no way could the trial be said to have been reduced to a "farce or sham," People v. Ibarra, 60 Cal. 2d 460, 464, 34 Cal. Rptr. 863, 866, 386 P2d 487, 490.

Appellant further contends that he was deprived of adequate representation in that his counsel did not advise him of his right to appeal. (App. Op. Br. p. 16.) As argued in the District Court this shows no dereliction of duty on the part of appellant's counsel. In its recent decision in People v. Hatten, 64 Cal. 2d 224, 228; 49 Cal. Rptr. 373, 376; 411 P2d 101, 104, the California Supreme Court stated:

" . . . It can be argued that an indigent should be entitled to advice of counsel during the period after sentence and before the notice of appeal must be filed. But neither this court, nor the federal courts, have as yet held that, in the absence of a request, the defendant must be advised either by the court or trial counsel of his right to appeal, or of his other rights to review, directly or collaterally, the trial proceedings. . . ."

We submit that appellant was ably represented by his counsel at trial and was found guilty because of the overwhelming evidence of guilt and not because of inadequate representation of counsel.

/

6. Cf., People v. Adamson, 34 Cal. 2d 320, 333; 210 P2d 13, 19; People v. Twiggs, 223 Cal. App. 2d 455, 464, 35 Cal. Rptr. 859, 864.



CALIFORNIA VEHICLE CODE SECTION 23105
WHICH PROHIBITS A PERSON FROM DRIVING
AN AUTOMOBILE WHILE ADDICTED TO, OR
UNDER THE INFLUENCE OF, A NARCOTIC IS
CONSTITUTIONAL AND PUNISHMENT FOR VIO-
LATION THEREOF DOES NOT CONSTITUTE
CRUEL OR UNUSUAL PUNISHMENT

Appellant contends that section 23105 of the California Vehicle Code is unconstitutional in that to punish a person for driving while under the influence of, or while addicted to a narcotic is cruel and unusual punishment. (App. Op. Br. p. 23.) That section provides:

"It is unlawful for any person who is addicted to the use, or under the influence, of narcotic drugs or amphetamine or any derivative thereof to drive a vehicle upon any highway. Any person convicted under this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year or by a fine of not less than two hundred dollars (\$200) nor more than five thousand dollars (\$5,000) or by both such fine and imprisonment."

Appellant's contention that such punishment is cruel and unusual is two-fold: first, as it is inherently cruel to punish a person for what appellant denominates "non-volitional conduct," and second, the punishment prescribed (up to five years in the state prison) is "cruelly excessive." (App. Op. Br. pp. 26-27.) In support of these contentions appellant cites

Robinson v. California 370 U.S. 660 and Driver v. Hinnant, 356 P2d 761 (4th Cir. 1966).

Appellee contends that punishment for driving a vehicle on a public highway while under the influence of, or addicted to, narcotics is neither cruel nor unusual, and California Vehicle Code section 23105 is constitutional.

In People v. O'Neil, 62 Cal. 2d 748, 753-54, 44 Cal. Rptr. 320, 323, 401 P2d 928, 931, cited by appellant (App. Op. Br. p. 15.), the California Supreme Court upheld the constitutionality of the driving while addicted to narcotics portion of this statute and stated:

" . . . To deny the privilege of driving to a person who may be subject to the physical infirmities of withdrawal or epilepsy clearly falls within the legitimate confines of the state's police power.⁹"

In the footnote the court stated:

⁹For this reason the proscription found in section 23105 does not fall under the holding of Robinson v. California (1962) 370 U.S. 660 [82 S.Ct. 1417, 8 L.Ed.2d 758], which declared unconstitutional that portion of Health and Safety Code, section 11721, which made criminal the status of narcotic addiction. The criminal offense proscribed by section 23105 is the driving of a vehicle, not the condition of addiction. The Legislature's decision to punish as a felon the individual who drives a vehicle while 'under the influence' of a narcotic drug is also clearly

reasonable; such an individual represents a potentially serious hazard to public safety. Medical authority supports the view that a person under the influence of a narcotic drug lacks the full measure of his capabilities; the presence of the drug within his system increases his reaction time, diminishes his perception, and clouds his judgment. While various drugs produce differing effects, the physical manifestations which may be exhibited by persons while under the influence of the more common narcotics are as follows: opiates, morphine, and morphine-like analgesics and barbiturates characteristically induce a somnolent state. (Proceedings, White House Conference of Narcotic and Drug Abuse (1962) pp. 279-285.) Marijuana commonly results in a distortion of the individual's perception of time and space. (Id. at p. 286.) Reports indicate that amphetamines often give rise to hallucinations. (Id. at p. 287.)"

People v. O'Neil, 62 Cal. 2d 748, 753-54, 44 Cal. Rptr. 320, 323, 401 P2d 928, 931.

The decision in Driver v. Hinnant, 356 F2d 761 (4th Cir. 1966) does not support appellant's conclusion herein. California Vehicle Code section 23105 does not prohibit being under the influence of or addicted to a narcotic "in a public place." The danger to the public of a person who appears in public while addicted to or under the influence of a narcotic is relatively minor in comparison to the danger of a person who drives a motor vehicle in such a condition. Nor is the act



of driving an involuntary result of the "disease" of addiction in the same sense that being in a public place while drunk is. Thus it is not inherently cruel to punish a person for driving while under the influence of or addicted to narcotics.

Nor may the term of imprisonment be said to be cruelly excessive in light of the possible dangers to society which result from the operation of a motor vehicle by a person not physically fit to do so. The penalty prescribed by law is imprisonment in the state prison for not less than one nor more than five years or imprisonment in the county jail for not less than 90 days nor more than one year or by a fine of not less than \$200 nor more than \$5,000 or a combination of fine and imprisonment. California Vehicle Code section 23105.

While in this case appellant was sentenced to the state prison for the term prescribed by law, the court had before it a man who had just suffered his tenth felony conviction. Nine prior convictions had been charged and admitted by appellant. (Rep. Tr. p. 3.) As a ten times convicted felon, appellant has no standing to complain of receiving a state prison sentence in this case, nor may the sentence be characterized as "cruelly excessive." And while the probation officer's report is not in the record, it is presumed to support the judgment of the court. C.f., People v. Walker, 215 Cal. App. 2d 609, 612, 30 Cal. Rptr. 440, 443.

We submit that California Vehicle Code section 23105 is a proper exercise of the state's police power and the punishment prescribed by law is not inherently cruel nor cruelly excessive.

AS THE TRIAL COURT'S INSTRUCTIONS
ON THE QUESTION OF ADDICTION WERE
SUFFICIENT AS A MATTER OF FEDERAL
CONSTITUTIONAL LAW, THERE IS NO
FEDERAL QUESTION ON THIS ISSUE

Appellant contends that the trial judge erred in instructing the jury on the meaning of addiction. (App. Op. Br. p. 15.) Appellee respectfully points out that this is a collateral attack on a judgment rendered on February 28, 1964 and from which no appeal was taken.^{7/} At the time of the trial, the trial court properly followed California law in instructing the jury. See People v. Kimbley, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519. More than a year later, on May 21, 1965, the California Supreme Court disapproved Kimbley in People v. O'Neil, 62 Cal. 2d 748, 756, 44 Cal. Rptr. 320, 325, 401 P2d 928, 933.

In addition, the record contains substantial evidence of the fact that appellant was under the influence of narcotics at the time of his arrest. First there was the statement of appellant to Officer Wingo that he had taken an injection of narcotics that night. (Rep. Tr. pp. 20, 33.) Dr. Buckingham testified that appellant was, in his opinion, under the influence of a narcotic at the time of his examination. (Rep. Tr. p. 59.)

7. It would appear that appellant's failure to seek relief under rule 31(a) California Rules of Court to enable him to file a late appeal would be a failure on his part to exhaust his state remedies. In addition, appellant could have petitioned the California Supreme Court or the Superior Court of the State of California in and for the County of San Luis Obispo for habeas corpus after the California Supreme Court's decision in People v. O'Neil, supra. This would have presented to the state courts the issue of the applicability of the O'Neil rule to final judgments.

At the time of his arrest, appellant had no alcoholic odor on his breath. (Rep. Tr. p. 16.)

The instructions given by the trial court on the question of addiction pursuant to People v. Kimbley, supra, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519, were not so vague so as to violate due process of law. The fact that the California courts later adopted a more stringent definition does not mean that all prior final judgments wherein the old instructions were used are void. Thus, the change in state law standards does not raise any federal question justiciable in this court.

VI

APPELLANT RECEIVED A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Appellant contends that he was deprived of a fair trial within the meaning of the due process clause of the fourteenth amendment of the United States Constitution. (App. Op. Br. p. 9.) Appellant attempts to circumvent the several decisions of the United States Supreme Court dealing with the question of retroactive application of constitutional guarantees by the apparent use of a theory which might best be phrased "accumulated error." Appellee contends that appellant received a fair trial and that the order of the District Court should be affirmed.

Basically the trial produced evidence on these issues: Did appellant drive a vehicle on a public highway while addicted to or under the influence of a narcotic? There was evidence that the arresting officer observed appellant's car go by at a high rate of speed. When stopped, appellant was unsteady on

his feet but did not have an alcoholic breath. His arms revealed numerous fresh needle marks. A physician examined appellant and was of the opinion that he was under the influence of a narcotic. In addition there were certain admissions made by appellant.

Appellee contends that in light of such evidence appellant was properly convicted of the crime charged. He was ably represented by competent counsel and in light of his past record of criminality received a just sentence.

CONCLUSION

For the foregoing reasons we respectfully request that the order of the United States District Court be affirmed.

Respectfully submitted,

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CR LA
66-189

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 19 and 18 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DAVID GOULD

DAVID GOULD

No. 21,340

In the

United States Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY,

Appellant,

vs.

C. R. SMITH (Successor), SECRETARY OF COM-
MERCE, STATES STEAMSHIP COMPANY and
SAN DIEGO UNIFIED PORT DISTRICT,

Appellees.

Petition of Matson Navigation Company for Rehearing with Suggestion of Rehearing En Banc

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June 14, 1968.

FILED
JUN 17 1968
B. LUCK, CLERK

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In the

United States Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY,

Appellant,

vs.

C. R. SMITH (Successor), SECRETARY OF COM-
MERCE, STATES STEAMSHIP COMPANY and
SAN DIEGO UNIFIED PORT DISTRICT,

Appellees.

**Petition of Matson Navigation Company for
Rehearing with Suggestion of Rehearing En Banc**

To the Honorable Ben Cushing Duniway and Walter Fly, Circuit Judges, and William M. Byrne, District Judge:

I.

Pursuant to Rule 23 of the Rules of this Court, Appellant Matson Navigation Company respectfully petitions for rehearing, and further petitions or suggests that the rehearing be *en banc*.

The correct application of Section 805(a) of the Merchant Marine Act, 1936 (46 U.S.C. § 1223(a)) (the Act),¹ is of vital importance to the few remaining operators, like Matson, of unsubsidized, ocean-borne freighter operations in domestic commerce.² The Act provided a comprehensive system of construction and operating subsidy benefits, including tax deferral privileges, for American flag operations in foreign commerce (46 U.S.C. §§ 1151-1183, 1177(h)). Such benefits and privileges were logically not extended to domestic operations, from which foreign flag vessels are excluded. As the court below correctly noted, "another important purpose of the Act was to promote the maintenance of an unsubsidized, privately-owned merchant fleet sufficient to carry the nation's 'domestic water-borne commerce'" (258 F.Supp. 144, 151).

Section 805(a) of the Act was intended primarily to further the latter objective. Subsidy and tax support had their place in the battle against foreign-flag competition; they had no place in the domestic service, as against unsubsidized operations.³ The decisions of the United States Maritime Commission and its successors for many years after 1936 meticulously applied Section 805(a) in accordance with its plain terms and purpose, holding subsidized

1. Record references and abbreviations sometimes used are as designated in Matson's brief of May 2, 1967 (MB) and Matson's reply brief of August 14, 1967 (MRB).

2. Others include Sea-Land Service, Inc. and Seatrain Lines, Inc. (Puerto Rico) and Alaska Steamship Co. (Alaska).

3. Generally, as to the legislative history, see MB 20-24. The present case presents a so-called mixed voyage situation wherein States Steamship Company received permission, which has not been stayed pending judicial review, to call its subsidized trans-Pacific vessels at Hawaii in domestic commerce with the Mainland on an additional 13 voyages in each direction yearly (permission for the first 13 voyages in each direction having

competition to be *prima facie* unfair competition and prejudicial to the objects and policy of the Act. This same concern for the protection of domestic commerce is manifested in two decisions, involving the Puerto Rico trade, of former Secretary of Commerce Hodges as late as 1964. (MB 24-26.)

The break with this line of precedent can probably be attributed to the unfortunate decision in *Pacific Far East Line, Inc. v. Federal Maritime Board*, 275 F.2d 184 (D.C. Cir. 1960), certiorari denied, 363 U.S. 827.⁴ In the instant case the Secretary designed what the Court below correctly called "a new standard or test of 'substantial competitive advantage'" (258 F.Supp. at 149).

Aside from the *PFEL* and *Seatrain* cases, *supra*, we are not aware of the decision of any other Court of Appeals dealing with Section 805(a). The instant case presents the Section to this Court for the first time. This Court's *per curiam* affirmance, after many months of deliberation, on the reasoning of the lower court's opinion leaves unanswered crucial questions in the application of Section 805(a) to the present and future cases (note 6, *infra*).

previously been granted and not in issue). The suggestion in the Government's Brief (pp. 34-36) that this was not the kind of situation thought to give rise to prior abuses does not survive examination. For example, one of the asserted abuses uncovered by the Postmaster General and before Congress in 1935 was the former Dollar Company's domestic intercoastal service segment of its subsidized around-the-world service. *Investigation of Air Mail and Ocean Mail Contracts*, Senate Committee Print for the Special Committee to Investigate Air Mail and Ocean Mail Contracts, Part 1, 75th Cong., 1st Sess. 225, 228 (1935).

4. Hereafter referred to as "the *PFEL* case". There the Court of Appeals, in a case involving a separate domestic service with unsubsidized vessels, stated that the Board had found *no* subsidy support, whatsoever, for the proposed domestic service and, therefore, it concluded there was no "unfair competition" under Section 805(a). However, the court further stated that unfair competition would result from the use of subsidy to "carry the loss" incurred in an unprofitable domestic service (275 F.2d at 186). In a later case, the same court construed "the obvious purpose" of Section 805(a) to be "to preclude having any part of the subsidy aid the domestic operation, for which no subsidy is available, and to prevent an advantage for one carrier to the detriment of his domestic competitors." *Seatrains Lines, Inc. v. Hodges*, 320 F.2d 737, 740 (D.C. Cir. 1963) (dictum), *rehearing denied en banc*.

We submit, with all deference, that this Court has the opportunity and obligation to resolve these issues.

A brief summary of two of these issues and of their disposition will demonstrate, we believe, both the public importance of the questions presented and the deficiencies in the treatment so far accorded them.

II.

A. In ascertaining in a mixed voyage situation, such as here, the presence and extent of subsidy support of the domestic operations by the subsidized, foreign operations, is it essential to apply full absorption (fully-allocated) cost accounting?

1. The answer has to be Yes, as a matter of law, and applying this accounting test to the undisputed facts, the 26 voyage domestic operation is shown to run up a loss of approximately \$1,000,000 annually.⁵

2. Matson argued that the Secretary accepted the necessity of fully allocated cost accounting and a loss in the range of \$1,000,000 annually. (MRB 3-4.) The Government and States disagree, and both have vigorously maintained that the Secretary did not hold (1) that it was necessary to apply fully-allocated cost accounting, (2) that the domestic operation would incur a loss, or a loss in any particular amount or range, or (3) that it was necessary to consider *any* question of cost allocation in order to decide the case. (GB 11-12, 13-15, 46-51; SB 20-22.)

3. The District Court did not resolve these crucial questions. It can hardly be claimed that the District Court perceived the importance Matson attaches to fully-allocating the costs of carrying the domestic cargo, or the financial consequences in loss and

5. This domestic service loss is made up from the concurrent foreign operations that are a part of the same 26 voyages. But the entire 26 voyages operate at a loss without subsidy, which, after all refunds and reductions, amounts on the 26 voyages to some \$3,000,000 annually. Q.E.D., the domestic operation is supported by subsidy to the tune of, in round figures, \$1,000,000 annually. (MB 3-4; MRB 7-8.) The District Court's footnote 7 (258 F.Supp. at 149), in its treatment of "residual subsidy", unhappily demonstrates the failure of Matson's counsel to convey the true situation as to subsidy support.

necessary subsidy support. (258 F.Supp. at 150 (first full para.) 154 (*ibid.*), 155-156; GB 13-15; SB 22.)

4. Can this and similar cases logically be decided unless it is determined whether and what method should be employed to determine the financial results of the domestic operations and the consequent degree of any subsidy support?⁶ This Court's *per curiam* affirmance leaves the matter at large. Does this Court believe that it is necessary to analyze the financial results of transporting the domestic cargo, or that this can be done without applying an accounting method? If not, what does it believe to be the right approach?

B. The Secretary's new test of "substantial competitive advantage" contemplates that the amount of subsidy support diverted to the domestic operation is to be balanced against various "equalizing forces" and related factors. (SD 69, pp. 52-53.) If the Secretary made no finding as to the amount of States' loss on the domestic cargo (and the consequent amount of subsidy support), how could he apply the balancing exercise?

1. We contend that the Secretary was bound as a matter of law to determine, at least approximately, the amount of subsidy support, and we further submit that subsidy support to the extent of anything approaching \$1,000,000 annually requires denial of Section 805(a) permission. The Congress that enacted the 1936 Act and its successors, which have reviewed Section 805(a) many times without change, would surely be aghast at any clearly stated expression to the contrary.

6. This Court may take official notice of the fact that the Maritime Administration/Maritime Subsidy Board of the Department of Commerce has pending before it, or has recently decided with judicial review pending, Special Dockets S-191, S-200, S-205 and S-211, all of which involve the question of whether the financial results of domestic trade operations by subsidized operators or their affiliates will result in prohibited support from subsidy paid for foreign trade operations. And for a discussion of the threat of the intrusion of subsidy into the domestic trades see the testimony of John Mason, attorney for Sea-Land Service, Inc., before a Subcommittee of the House Merchant Marine and Fisheries Committee May 15, 1968. Cong. Information Bureau, Vol. 72, No. 96, pp. 7, 10-15.

2. But, passing this, and applying the Secretary's own test (SD 69, pp. 41-43, 52-54), how is it possible to balance subsidy support against "equalizing forces" if the amount of subsidy support is unknown? The District Court had no answer to this question (258 F.Supp. at 155-56), and the only possible answer is that a balancing exercise in these circumstances is impossible under the laws both of subsidy and gravity. In a recent case the Supreme Court concluded that the District Court had erroneously appraised the factor to be placed on one side of the scales in a weighing process suggestive of that invoked by the Secretary here. The Court concluded:

"To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court can perform again the balancing process mandated by the Act." *United States v. Third Nat. Bank*, 19 L. Ed.2d 1015, 1025 (March 4, 1968) (footnote omitted).

3. We submit that this Court should speak its mind on this matter, and, at the least, follow the course of the Supreme Court in remanding.

CONCLUSION

For these reasons, a rehearing should be granted, we suggest, *en banc*.⁷

Respectfully submitted,

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June 14, 1968.

7. Should rehearing be granted *en banc*, we would expect to reargue a limited number of other issues in the case not reviewed in this petition.

CERTIFICATE OF COUNSEL

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

ALVIN J. ROCKWELL

Attorney for Matson Navigation Company

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAINTERS DISTRICT COUNCIL No. 36, AFL-CIO,
RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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Cases:	Page
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<i>Local 164, Brotherhood of Painters v. N.L.R.B.</i> , 293 F. 2d 133 (C.A.D.C.), cert. den., 368 U.S. 824	16, 17, 20
<i>Metropolitan District Council of Philadelphia Carpenters</i> , 137 NLRB 1583	12-13, 22
<i>N.L.R.B. v. American Compress Warehouse</i> , 321 F. 2d 547 (C.A. 5), cert. den., 375 U.S. 968	17
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21343

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAINTERS DISTRICT COUNCIL No. 36, AFL-CIO,
RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Painters District Council No. 36, AFL-CIO (hereinafter the Council) on November 17, 1965, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).¹ The

¹ Pertinent provisions of the Act are set forth, *infra* pp. 24-25.

Board's decision and order (R. 31)² are reported at 155 NLRB No. 92. This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent Council coerced and restrained Commercial Drywall Constructors, Inc. (Commercial) in the selection of its collective bargaining representative, in violation of Section 8 (b) (1) (B) of the Act, by forcing Commercial to bargain through a Contractors Association which maintained a pre-existing agreement with the Council and by forcing Commercial to submit grievances to the Joint Committee which administered that contract. The Board further found that the Council refused to bargain in good faith with Commercial, in violation of Section 8(b) (3) of the Act, by insisting as a price of agreement, that Commercial accept a contract requiring the posting of a performance bond and the contribution of money to an industry promotion fund. The facts on which the Board predicated its findings are as follows:

² References to the pleadings and decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume 1, pleadings, are designed "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Ex." refers to the General Counsel's

A. *Background*

Prior to the events in this case, the Council maintained a collective bargaining contract with an employers' group called the Painting and Decorating Contractors Association of Los Angeles County (Contractors Association). The contract provided, *inter alia*, for area and county Joint Committees consisting of representatives of the Association and the Council to administer the agreement, to resolve grievances and to impose monetary fines and penalties (R. 19-20; G.C. Ex. 16, pp. 20, 21, 24). In addition to wages, hours, and conditions of employment, the agreement required employers to (1) carry a "Responsibility Bond" in the amount of \$1000 to guarantee payment of wages, fringes, and monetary obligations imposed by the Joint Committee; and (2) to make set contributions to the Administrative Fund Trustees, who had sole discretion to use these sums to defray the cost of administering the agreement.³

Exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

³ The contract provided:

ARTICLE 1 EMPLOYERS

* * * *

Section 2. LICENSE, BONDING AND LEGAL REQUIREMENTS. Every Employer signatory shall have a duly issued and effective California State Contractors License where required by law to perform the work covered by this Agreement, shall carry Responsibility Bonds (see page 59), Workmen's Compensation Insur-

(Footnote continued on following page)

³ (Continued)

ance and shall comply with all Federal, State and Municipal Laws pertaining to the work covered by this Agreement.

* * * *

ARTICLE 8

ADMINISTRATION

Section 2. CONTRIBUTORS: Every member signatory to this Agreement shall pay to the Administrative Fund Trustees for the purposes set forth below the following sums for every hour worked by every journeymen and apprentices employed under this Agreement. (a) Between July 1, 1964 and December 31, 1964 2¢ per hour; (b) Between January 1, 1965 and June 30, 1965 3¢ per hour and (c) Between July 1, 1965 and June 30, 1969 4¢ per hour.

* * * *

Section 4. EXPENDITURES:

A. The Administrative Fund Trustees shall determine, within their sole discretion, how the said contributions shall be expended to defray the cost of administering this Agreement, to maintain maximum employment and good workmanship in the industry, to foster cooperative relationships between architects, engineers, builders and contracting agencies on the one hand and painting and decorating contractors on the other, and to perpetuate the harmonious relations that have existed between management and labor in the painting and decorating industry; provided, however, that no portion of said contributions shall be paid to any representative of a labor organization as prohibited by the Labor-Management Relations Act.

* * * *

(Footnote continued on following page)

^a (Continued)

ARTICLE 16

MANNER OF PAYMENT OF WAGES

Section 7. RESPONSIBILITY BOND:

Each contractor signatory to said Agreement shall, by September 1, 1961, post with the Los Angeles County Painters and Decorators Joint Committee, Inc., cash or other security acceptable to the Joint Committee or a surety bond, in the amount of \$1000.00 to guarantee any deficiency of such employer in the payment of wages, health and welfare and other fringe benefits and or any other monetary obligations that are duly imposed under the provisions of this Agreement.

Each employee, Trust Fund or other person or entity having a claim against any contractor under the provisions of this Agreement shall notify the Los Angeles County Painters and Decorators Joint Committee, Inc., in writing, of the facts and circumstances of such unpaid obligation. The Joint Committee, or its representative, shall, after verification of the indebtedness, process a certification of default to the surety company for payment under the terms of the surety bond and remit the funds received from the surety company to the person, fund or entity entitled thereto.

In the event, the employer has deposited cash or other security under these provisions, the Joint Committee, or its representative, shall, after verification of the indebtedness, withdraw from said cash deposit or convert said security to cash and forward to the obligee thereof, sufficient funds to discharge such obligation. Within 24 hours after notice to any employer of such payment by the Joint Committee out of that employer's cash or other security deposit, the employer shall replenish his cash or security deposit to the original sum of \$1000.00 or to such further sum as the Joint Committee shall determine as necessary to guarantee future deficiencies of such employer.

(Footnote continued on following page)

Just before the events at issue here, the Council and the Contractors Association had been negotiating a new contract, mainly to revise the wages, hours, working conditions and fringe benefits that had existed previously. Although negotiations were concluded, the new agreement had not yet been printed.

B. Respondent Council demands under threat of economic sanctions that Commercial sign the contract concluded with the Contractors Association; the contract requires posting of a performance bond and contributions to an industry promotion fund and acceptance of the Contractors Association as bargaining representative for Commercial.

Commercial is a subcontractor in the building and construction industry engaged in the installation of metal studs and the hanging and taping of drywall (R. 17; Tr. 21-22). In the summer of 1964, Commercial contracted to install wallboard in construction work located at Van Nuys, California, within the Council's jurisdiction (Tr. 29). Commercial began work on that project on June 1 (Tr. 23). On July 1, 1964, Commercial's secretary, Frank A. Calhoun, learned that a man from a Council affiliated Painters' local was at the site talking to the tapers (Tr. 23). Fearing lest the Council impede his workmen at the construction site, Calhoun arranged to dis-

³ (Continued)

Should the Los Angeles County Joint Committee determine that the liability of any employer under this agreement is greater than the sum of \$1000.00, they may immediately demand and cause the employer to increase his cash deposit or surety bond to an amount sufficient to cover any such liability.

cuss matters with the Council which, concededly, was the bargaining representative of Commercial's employees (R. 18, n. 2; Tr. 29). A meeting took place on July 1 at the Council's office. Those present were Calhoun, Commercial's president William Knorr, the Council's executive secretary Tom Prophet, and his associate Walter Zagajeski. At the outset, Prophet stated that in order for Commercial to perform work in the Los Angeles area it must sign an agreement with the Council (R. 18; Tr. 29). Prophet then handed Calhoun an "Application for Shop Card Of The Los Angeles County Painters and Decorators Joint Committee" (R. 18; G.C. Exh. 2; Tr. 29-30). The card required the signatory employer to agree to a contract between the Council and the Contractors Association, and any amendments, modifications or interpretations of that contract (G.C. Exh. 2).

Calhoun protested. He asked to see the agreement to which the shop card referred. Prophet, explaining that negotiations had just ended but that the agreement was not yet printed, showed Calhoun a mimeographed sheet listing the wages and fringe benefits Commercial would be required to pay. Calhoun agreed to these cost items, but did not agree to sign the card (R. 18; Tr. 31-33).

Subsequently, Calhoun obtained a proof copy of the new agreement at the offices of the Joint Committee (R. 20; Tr. 35). In addition to the provisions of the agreement referred to above, the Agreement provided that it could be amended by the Joint Committee, subject to approval of a majority of the members of the Association and the Council (G.C. Exh. 11, p. 21).

that the Agreement would be administered by the Joint Committee, the Association, and the Council (*id.* at p. 24), and that chapters affiliated with the Painting and Decorating Contractors of America and of California "shall be the sole representative . . . for the purposes of establishing the wages, hours and terms of this agreement." *Id.* at 4.

On July 1, Calhoun telephoned Zagajeski. Calhoun reiterated his willingness to abide by the working conditions and pay the wages and fringe benefits set out in the contract. But he balked at the performance bond requirement, at the industry promotion fund fee, and at Commercial's representation by the Contractors Association. Prophet told him, however, "We cannot change any part of this agreement. You will have to sign the same thing everyone else does" (Tr. 35). Calhoun replied that what Commercial wanted was a contract with the Council, not a contract with the Joint Committee (R. 18; Tr. 30). At this point, Prophet produced a mimeographed paper showing the wages and fringe benefits newly negotiated with the Contractors Association (R. 18; Tr. 32). Calhoun did not object to these items. He expressed willingness to sign a contract based upon the negotiated figures (R. 18; Tr. 33). But this solution did not meet with the Council's approval and the session adjourned.

On July 2, 1964, Calhoun contacted Zagajeski at the Council by telephone. He reiterated Commercial's willingness to adopt the wages, hours, working conditions and fringe benefits under the new Contractors

Association contract (R. 20; Tr. 36). But he stated that Commercial would not agree to be represented by the Contractors Association, to post a performance bond, to contribute to the industry promotion fund, or to submit to the disposition of grievances by the Joint Committee (R. 20; Tr. 36). Zagajeski was adamant. The Council, he said, would not sign an agreement with Commercial and as far as he was concerned, Commercial would have to deal with the Joint Committee (R. 20; Tr. 36).

On July 5, 1964, Calhoun consulted an attorney who subsequently wrote a letter to Council on Commercial's behalf (G.C. Exh. 4) agreeing to the wages, hours, and other terms and conditions of employment set out in the Los Angeles Painters and Decorators Joint Committee agreement. But Commercial's attorney insisted that Commercial would not accept the Painting and Decorating Contracting Association as its collective bargaining and grievance adjustment representative. The letter also objected to the contract's requirement that a responsibility bond be posted by the signatory contractor (*ibid.*).

Responding to Commercial's letter, Council wrote a letter on August 4 (G.C. Exh. No. 7) stating Council's readiness to execute an agreement "covering the wages, hours, and all of the terms and conditions of employment in accord with the existing bargaining agreements which are uniform with respect to all employers." The letter continued, "There are reasons for the responsibility bond, and I am sure that you will agree with us, and the reasons for the interlock-

ing obligations with other Unions, which have been long standing in the history of labor, and which are problem items of not only negotiations and bargaining, but of contract. Some of these are mandatory subjects of bargaining; one or two may be non-mandatory. Nevertheless, we believe that in an atmosphere of sincerity, on both parts, we can conclude our Agreement between us, and incorporate these items so that we have uniformity for your benefit and for the benefit of all" (G.C. Exh. 6).

Another meeting of the principals on August 11 ended without agreement. Zagajeski proposed a few changes, none of which met Commercial's major objections (G.C. Exh. No. 9). Calhoun inquired whether, if Commercial agreed to the changes, the Council would sign. Zagajeski refused (Tr. 46). There then ensued an interchange of correspondence, and on October 23 the parties met again.

The meeting was prompted by a telephone call which Commercial President Knorr received from the Hight Construction Company, where Commercial had undertaken a new job (Tr. 48). Hight told Commercial to get its union problems straightened out or its contract would be cancelled (Tr. 48).⁴ Knorr immediately arranged a meeting with the Council. Present at the meeting were Zagajeski, Knorr and Cal-

⁴ Calhoun also learned from his foreman on the job that the Union business agent had stopped by and stated that "there would be no more tapers allowed to work there on that job since Hight Construction Company was signatory to an AGC agreement, and that there wouldn't be any workers referred to that job until a contract was signed" (Tr. 71).

houn (Tr. 48). Calhoun inquired of Zagajeski at the outset, "Well, what could we do to get the job going?" (Tr. 48). Zagajeski responded, "Well, all you got to do is sign this agreement" (R. 21; 48, 101). Calhoun objected. He stated that no prudent business man would sign such an agreement; that the payments required were violative of the antitrust laws and of the Extortion Act (Tr. 49, 50). Zagajeski replied, "there will be no men on that job unless an agreement is signed" (R. 21; Tr. 50). Calhoun walked out (Tr. 100). Zagajeski then repeated to President Knorr his assertion that the only way to put men back on the job and keep Hight out of trouble was to sign the application for a shop card (Tr. 101). Knorr subsequently signed the agreement, paid the shop card fee, and posted the bond (Tr. 101).

II. The Board's Conclusions and Order

On the basis of the foregoing facts, the Board concluded that the performance bond and the contribution of money to an industry promotion fund were not mandatory subjects of bargaining and that respondent Council's insistence on the inclusion of these provisions as the price for agreement violated Section 8(b)(3) of the Act (R. 22, 24). The Board further found that by coercing Commercial to accept the Contractors Association as its collective bargaining representative and to use the Joint Committee for the resolution of grievances, the Council violated Section 8(b)(1)(B) of the Act (R. 23, 24). The Board's order requires the Council to cease and desist from the

unfair labor practices found and from enforcing the performance bond and industry promotion fund contribution provisions of the existing contract with Commercial or from renewing that contract or resolving grievances under it except where Commercial, through its own representatives, agreed to such action (R. 24). Affirmatively, the Board's order requires the Council to notify Commercial in writing that it will not insist upon contract provisions that are not mandatory subjects of bargaining, to reimburse Commercial for expenses incurred in connection with the performance bond and the industry promotion fund contributions, and to post appropriate notices (R. 24).

ARGUMENT

I. The Board Properly Found That Respondent Restrained and Coerced Commercial In Its Choice of Bargaining Representative, In Violation of Section 8(b)(1)(B) of the Act

Section 8(b)(1)(B) of the Act states that it is an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining". By insisting, despite Commercial's vehement and reiterated objections, (Tr. 29, 30, 36), that if Commercial was to perform work in the Los Angeles Area, it must accept the Contractors Association as its bargaining and grievance representative and use the Joint Committee machinery for the resolution of grievances, the Council violated the Act. *Metropolitan District Council of Philadelphia Carpenters*, 137

NLRB 1583; *Local 2, Operative Plasterers and Cement Masons*, 149 NLRB 1264, petition for enforcement filed, December 2, 1965 (Civ. No. 20583 (C.A. 9)). Cf. *N.L.R.B. v. Local 294, Teamsters*, 284 F. 2d 887 (C.A. 2); *ITU Local 38 v. N.L.R.B.*, 278 F. 6, 11-12 (C.A. 1), affirmed in relevant part by an equally divided court, 365 U.S. 705.⁵

It is clear that the Council threatened work stoppages to compel Commercial to accept the Association as its bargaining representative. Council's Executive Secretary Tom Prophet announced at the outset that Commercial could not perform work in the Los Angeles Area unless it signed the contract (Tr. 29, 35) and that only by signing the contract could Commercial put men back on the Hight Construction Company job (Tr. 49-50, 101). Prophet refused to deviate from his refusal to sign an agreement with Commercial alone although he testified at the hearing that the Council had on occasion negotiated individually with other employers (Tr. 217-218). Council demanded that Commercial sign the contract if it wanted to proceed with its work at the construction site. "There will be no men on that job," stated Prophet, "unless an agreement is signed" (Tr. 50).⁶

⁵ The Joint Committee consisted of an equal number of representatives of the Council and of the Association (G.C. Ex. 11, p. 22).

⁶ Contrary to evidence adduced by the General Counsel, respondent contends it did not invoke economic sanctions to induce Commercial to sign the contract. The Trial Examiner, however, credited the testimony of Commercial's witnesses. This Court is bound by his finding. Credibility of witnesses

Since, as shown in the Statement, *supra*, pp. 8-11, one of the principal stumbling blocks to agreement was Council's refusal to sign an agreement with Commercial alone, Council's insistence that Commercial agree to representation by the Association violated Section 8(b)(1)(B) of the Act.

II. Respondent Violated Section 8(b)(3) of the Act by Insisting as the Price of Agreement, That Commercial Sign a Contract Requiring It to Post a Performance Bond and to Make Contributions to an Industry Promotion Fund

Agreement between Council and Commercial foundered not only upon Council's insistence that Commercial accept an unwanted bargaining agent, but also upon Council's rejection of Commercial's offer to accept the wages, hours, and working conditions set forth in the agreement because Commercial would not agree to post a performance bond or to contribute to the industry promotion fund set up in the agreement. Council's insistence upon these two provisions prevented consummation of an agreement fixing working conditions and therefore constituted a violation of Section 8(b)(3) of the Act.

The law is well settled that neither an employer nor a Union in the course of collective bargaining can condition willingness to negotiate or contract about working conditions upon the other party's acceding to demands which do not relate to wages, hours, and

and reasonable inferences to be drawn from the evidence are matters for determination by the Board. *N.L.R.B. v. IBEW, Local 340 (Walsh Construction Co.)*, 301 F. 2d 824, 827-828 (C.A. 9).

other terms and conditions of employment. As the Supreme Court stated in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349;

“Read together, these provisions [Section 8(a) (5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to ‘wages, hours, and other terms and conditions of employment.’ The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board v. American National Insurance Co.*, 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

The Company’s good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.”

As shown in the Statement of Facts, Commercial repeatedly offered to adopt the wage, hours, and fringe benefits already incorporated in the Association Contract, see pp. 7-8, *supra*, but refused to agree to the performance bond and industry promotion fund clauses of the contract. Commercial capitulated only under threat of economic sanction. Consequently, if a performance bond clause and an industry pro-

motion fund clause are outside the scope of the bargaining obligation established by Section 8(d) of the Act and therefore constitute non-mandatory subjects of bargaining about which neither party may require the other to yield, the Board's order should be enforced. See *International Longshoremen's Assn. v. N.L.R.B.*, 277 F. 2d 681, 683 (C.A. D.C.).⁷ We show below that both these matters are non-mandatory subjects of bargaining.

A. *The performance bond clause was not a mandatory subject of bargaining*

It has consistently been held by the Board and the courts that a union violates Section 8(b)(3) of the Act by insisting that, as a condition precedent to executing a collective bargaining agreement, the employer agree to post a bond or its equivalent to afford the union or the employees security against possible defaults. *Carpenters District Council of Detroit v. N.L.R.B.*, 58 LRRM 2064 (C.A.D.C.), enforcing 145 NLRB 663; *Local 164, Brotherhood of Painters v. N.L.R.B.*, 293 F. 2d 133 (C.A.D.C.), cert. denied, 368 U.S. 824; *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972, 978-979, aff'd on other grounds *sub nom. Rabouin v. N.L.R.B.*, 195 F. 2d 906 (C.A. 2); *International Hod Carriers, Building and Common Laborers, Local 1082*, 150 NLRB 158, petition for enforcement filed, February 25, 1966, (Civ. No. 20775 (C.A. 9)); *Local 2, Operative*

⁷ "The right of the union to urge a non-mandatory subject of bargaining ceases short of ultimate insistence." *Ibid.*

Plasterers and Cement Masons, 149 NLRB 1264, petition for enforcement filed December 2, 1965, Civ. No. 20583 (C.A. 9). Similarly, an employer's insistence upon a performance bond or like guarantee on the part of the union has been held violative of Section 8(a) (5). *N.L.R.B. v. American Compress Warehouse*, 321 F. 2d 547 (C.A. 5), cert. denied, 375 U.S. 968; *N.L.R.B. v. Davison*, 318 F. 2d 550 (C.A. 4); *N.L.R.B. v. F. M. Reeves & Sons, Inc.*, 47 LRRM 2480 (C.A. 10), cert. denied, 366 U.S. 914; *N.L.R.B. v. Taormina*, 207 F. 2d 251 (C.A. 5); *N.L.R.B. v. Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), cert. denied, 342 U.S. 824; *N.L.R.B. v. Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), cert. denied, 340 U.S. 811.

The plain language of the statute itself establishes that performance bonds are beyond the scope of mandatory collective bargaining. Section 8(d) requires bargaining with respect to "terms and conditions of employment," not guarantees running to one party in the event the other commits a breach of contract. Such guarantees bear only an attenuated relation to the "actual performance of work" (*Local 164, Brotherhood of Painters v. N.L.R.B.*, *supra*, 293 F. 2d at 135). That "Congress has provided a remedy to be available in the event of a breach of contract" itself indicates that performance bonds have been excluded from the area of mandatory collective bargaining. *Local 164, United Brotherhood of Painters v. N.L.R.B.*, *supra*.

Further, insistence upon a performance bond impedes effective collective bargaining because it tends to interfere with the ripening of otherwise effective collective bargaining into a final agreement. As the Board held in *Conway's Express, supra*, (87 NLRB at 978-979) :

“The question is whether this demand for a bond was consistent with the Union’s obligation to bargain under Section 8(b)(3). We think it was not. The Board, as early at 1940, held in the *Blackburn* case [21 NLRB 1240] that by demanding that a union post a performance bond, an employer sought to prefix the fulfillment of its statutory obligation with a condition not within the provisions, and manifestly inconsistent with the policy of the Act, and therefore violated Section 8(a)(5) of the Act. We believe that the same rule should apply in the converse situation, where the demand for a performance bond is made by a union rather than by an employer. * * * It is true that the Union’s insistence upon a bond, in the circumstances of this case, was not wholly unreasonable and that it was not, so far as the record shows, designed to frustrate the settlement of the strike. However, the Union’s good faith in advancing this proposal is not decisive of the issue. It is the *tendency* of such proposals to ‘delay or impede or otherwise circumscribe the bargaining process,’ which renders them improper.”

Particularly, the Board has expressed concern that permitting unions or employers to insist upon performance guarantees would create an obstacle to agreement which only a financially able party could

successfully avoid. Unless a party undertook to prove its financial inability to provide appropriate contract guarantees and the Board undertook to pass upon the sufficiency of this evidence, a collective bargaining agreement would in fact be beyond its reach unless it could somehow provide the necessary security.

In short, the tendency unquestionably would be to restrict effective collective bargaining to financially secure parties, in clear derogation of national labor policy. An objective of the statute is to eliminate obstructions to the free flow of commerce by encouraging collective bargaining concerning "terms and conditions of employment." Section 1 of the Act. Since the flow of commerce can be disrupted as readily by a dispute involving a relatively impecunious employer or labor union as by a dispute involving large, well established organizations, the statutory requirement that parties negotiate in good faith toward collective bargaining agreements cannot be limited to prosperous employers and unions, or denied to those which cannot provide substantial surety or guarantee of their undertakings.

For the above reasons, the Board has consistently adhered to its position that performance bonds and their equivalent are not mandatory subjects of collective bargaining, and that the language "wages, hours, and other terms and conditions of employment" cannot properly be construed to encompass performance guarantees demanded as a precondition to entering into a collective bargaining contract. This is so even if the performance guarantee in question can be read

as securing only employee benefits within the scope of Section 8(d). See *Carpenters District Council of Detroit (Excello Dry Wall Co.)*, 145 NLRB 663, enf'd 58 LRRM 2064 (C.A.D.C.) (per curiam). There, the union conditioned agreement upon the establishment of a fund, to be placed in escrow, as security for the payment of wages and fringe benefits. The Board, with court approval, found that such a provision was not a subject of mandatory bargaining. For insistence upon that fund erected precisely the same obstacle to effective bargaining as insistence upon the posting of a broader performance bond payable upon any breach of the collective bargaining agreement. In each case, the implementation of the agreement is conditioned by the union upon a preliminary performance on the part of the employer. In neither is the performance requested properly a "term or condition of employment." Rather, it is a condition precedent to employment, a form of sanction in the event of breach of contract, and has little if anything to do "with the actual performance of work or to subsequent relations" (*Local 164, Painters v. N.L.R.B.*, *supra*, 293 F. 2d at 135).

In sum, the Board's holding here that the Council's bond proposal is not a mandatory subject of collective bargaining accords not only with sound labor policy, but with prior decisions of the Board and the courts. The Council's insistence on the inclusion of such a clause, and its coercion of Commercial into signing a contract containing one, clearly is violative of Section 8(b) (3).

B. *A proposal that an employer contribute to an industry promotion fund is not a mandatory subject of bargaining*

Like insistence upon a performance bond, insistence that an employer or a union contribute to an industry promotion fund is also an unfair labor practice. *N.L.R.B. v. Detroit Resilient Floor Decorators Local*, 317 F. 2d 269 (C.A. 6). As the Sixth Circuit said in the cited case: "To hold, however, under this Act that one party must bargain at the behest of another on any matter that might conceivably enhance the prospects of the industry would transform bargaining over the compensation, hours, and employment conditions of employees into a debate of policy objectives . . ." "The question of participation in an industry promotion fund is not a mandatory subject of bargaining because it is neither wages, hours, nor a term or condition of employment." 317 F. 2d at 270, quoting *Detroit Resilient Floor Decorators Local*, 136 NLRB 769, 771. Accord *Local 2, Operative Plasterers and Cement Masons (Arnold Hansen)*, 149 NLRB 1264, petition for enforcement filed December 2, 1965 (Civ. No. 20583, C.A. 9). Thus, the industry promotion fund is outside the employment relationship. It concerns itself rather with the relationship of employers to one another or, like advertising, with the relationship of an employer to the consuming public. Just as in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, the "strike vote clause" there in issue was held not to be a mandatory subject of bargaining because it dealt only with relations between employees and their union, as distinct from a

“no strike” clause, which regulates the relations between the employer and the employees, 356 U.S. at 350, so here the industry promotion fund deals neither with wages, hours, or conditions of employment, nor with the employer-employee relationship. Accordingly, the Council’s insistence that Commercial sign a contract requiring it to make contributions to an industry promotion fund, coupled with Council’s threat of a work stoppage to compel Commercial to sign the agreement, violated the union’s obligation to bargain in good faith. See *N.L.R.B. v. Detroit Resilient Floor Decorators, Local*, *supra*; *Metropolitan District Council of Philadelphia, Carpenters*, 137 NLRB 1583; *Operative Plasterers and Cement Masons*, *supra*; *Local 80, Sheet Metal Workers*, 161 NLRB No. 7, decided October 21, 1966, 63 LRRM 1261 and cases cited therein.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

December 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; * * *

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the

proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

NO. 21,311 /

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY LEE CHRISTIANSEN,

Plaintiff and Appellant,

v.

JOSEPH C. O'CONNOR, Sheriff
of San Diego County, State of
California,

Defendant and Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

APPELLEE'S BRIEF

FILED

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THOMAS C. LYNCH, Attorney General

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JACK K. WEBER,
Deputy Attorney General

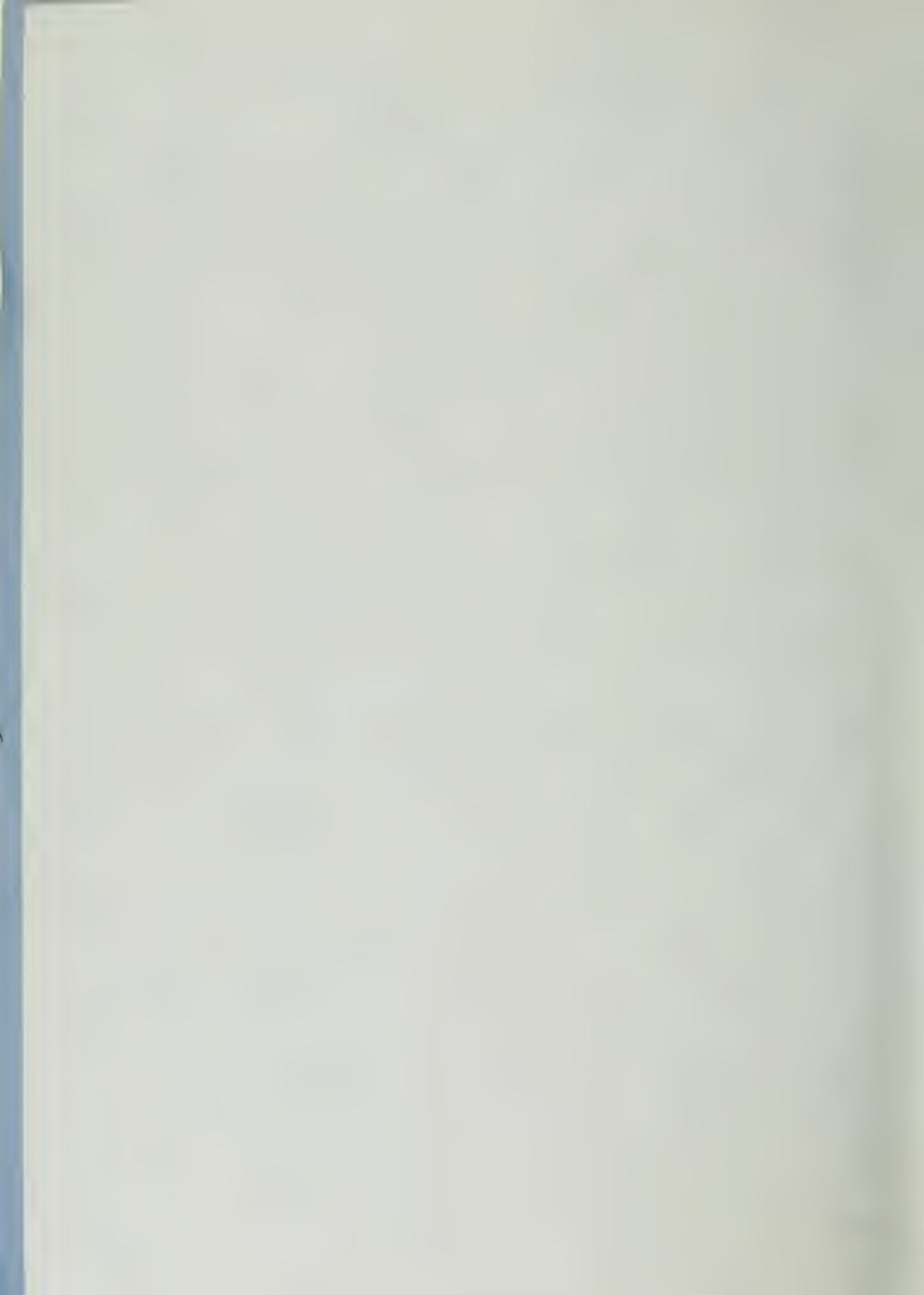
Attorneys for Appellee,
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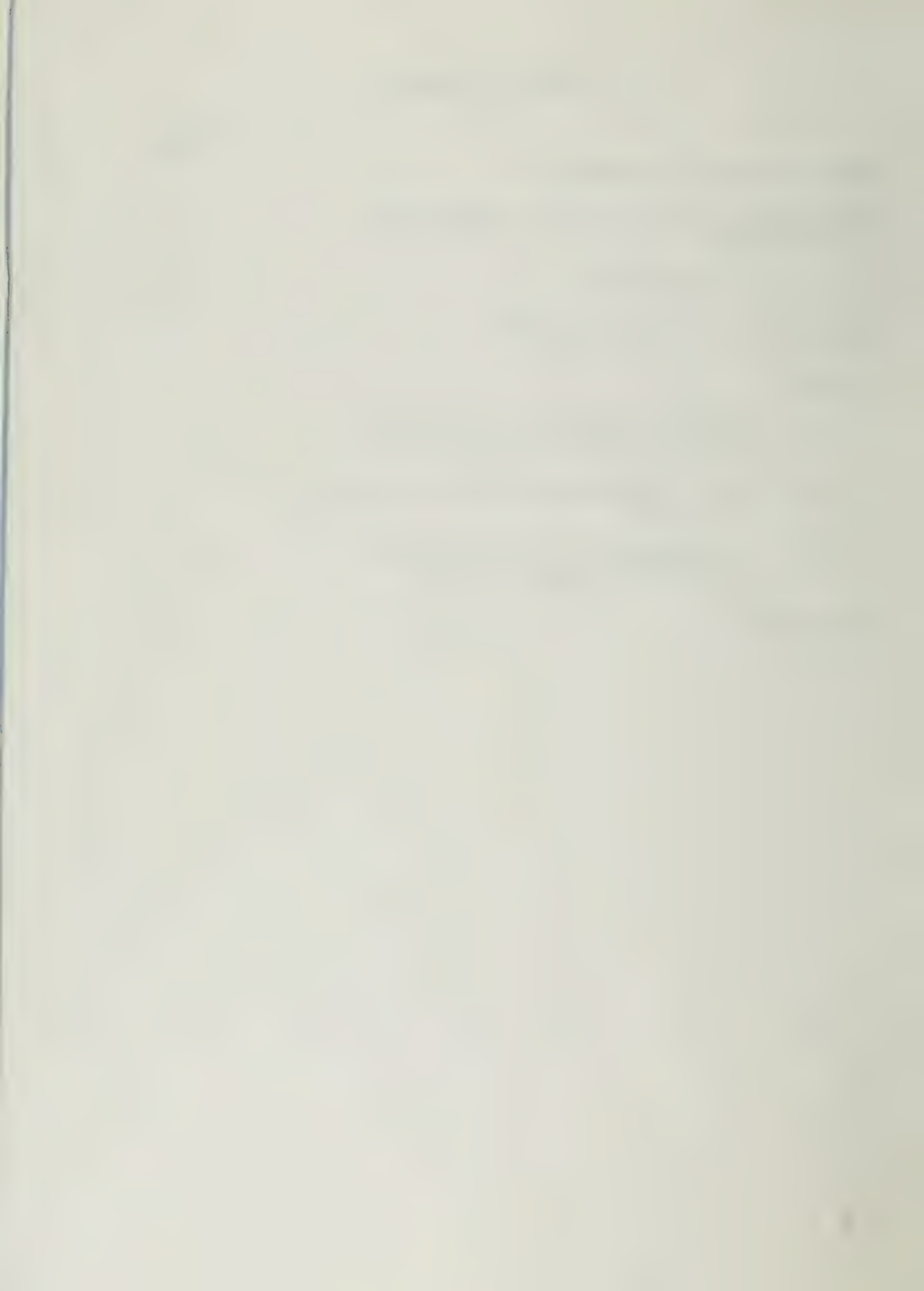
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY LEE CHRISTIANSEN,

Plaintiff and Appellant,

v.

NO. 21,351

JOSEPH C. O'CONNOR, Sheriff
of San Diego County, State of
California,

Defendant and Appellee.

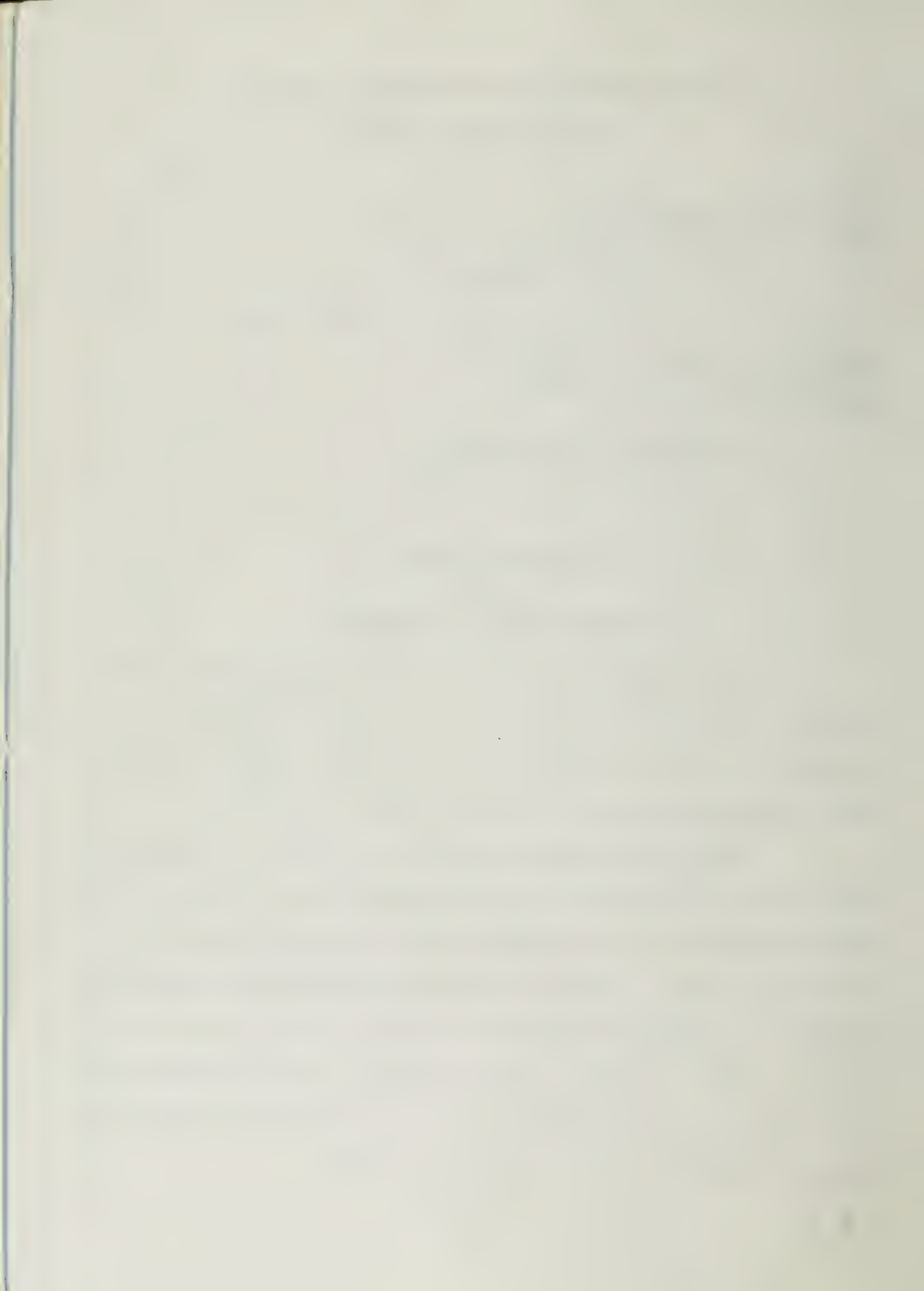
APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus by a state prisoner. 28 U.S.C.A. § 2241 (a), (2) (3). Such a petition was filed by appellant on June 8, 1966. (Cl. Tr. p. 2.)

This Court has jurisdiction to review on appeal a final order of a district judge denying a writ of habeas corpus when a certificate of probable cause has been granted. 28 U.S.C.A. § 2253. The order dismissing the petition was filed on July 8, 1966, and entered on July 11, 1966. (Cl. Tr. p. 10.) An order granting a certificate of prosecutive review was filed July 18, 1966. (Cl. Tr. p. 22.) A notice of appeal was filed on August 5, 1966. (Cl. Tr. p. 23.)

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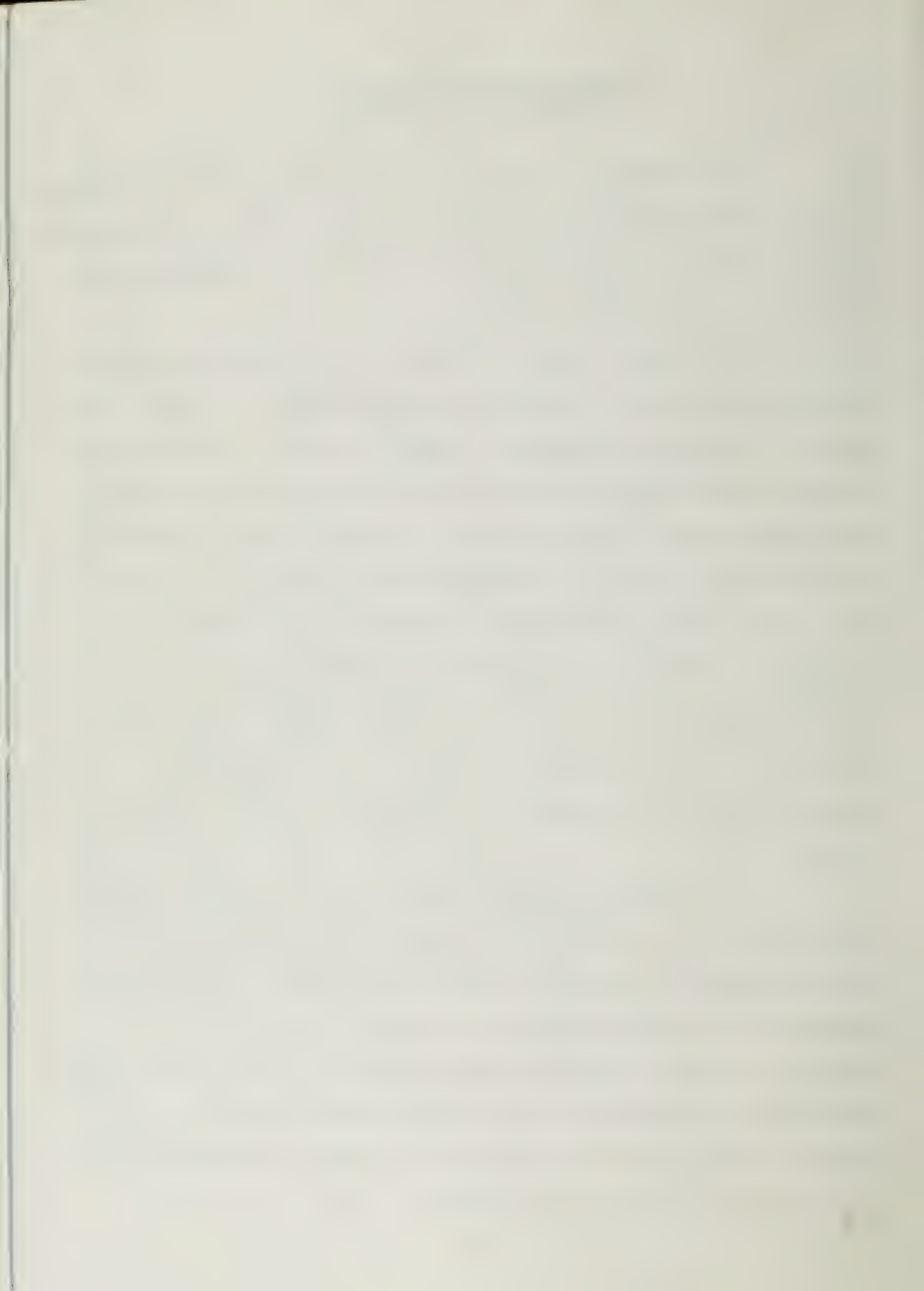
STATEMENT OF THE CASE AND
STATEMENT OF THE FACTS

(A summary of the allegations of the petition follows:)

Petitioner was charged with grand theft in a complaint filed with the California Municipal Court, San Diego Judicial District, on November 23, 1962.

Two months later petitioner was arrested in Arizona and was continuously imprisoned until November 19, 1965. From April 5, 1963, to September 2, 1964, he served a term in the Arizona State Prison for burglary and issuing checks without sufficient funds. In the federal courts he was convicted of transporting a stolen car in interstate commerce. He served three years concurrent with his Arizona term. After September 2, 1964, he completed his federal term first at La Tuna, Texas, until July 1, 1965, and then at Sandstone, Minnesota, until November 19, 1965. He was paroled to Arizona and his term expired on January 31, 1966. (Cl. Tr. p. 3.)

A detainer from San Diego was placed on petitioner on the day of his arrest. He signed a waiver of extradition. Subsequently, the San Diego District Attorney initiated an extradition request which was forwarded to Arizona on February 5, 1963, "and returned on April 3, 1963, because of petitioner's sentence to the Arizona State Prison." A detainer was placed on petitioner at the Arizona State Prison, but not at the federal institutions. (Cl. Tr. pp. 3-4.)



In July 1964 petitioner made a "Motion to Quash a Pending Charge for Failure to Prosecute" which he now terms a written demand for trial or dismissal. The District Attorney took no further action to obtain custody.

Petitioner came to San Diego in February of 1966, was arrested for "suspicion of burglary," and was later booked on the grand theft charge.

APPELLANT'S CONTENTIONS

It is contended that appellant was denied the right to a speedy trial and that there was an unreasonable delay in bringing him to trial.

SUMMARY OF APPELLEE'S ARGUMENT

Appellee contends:

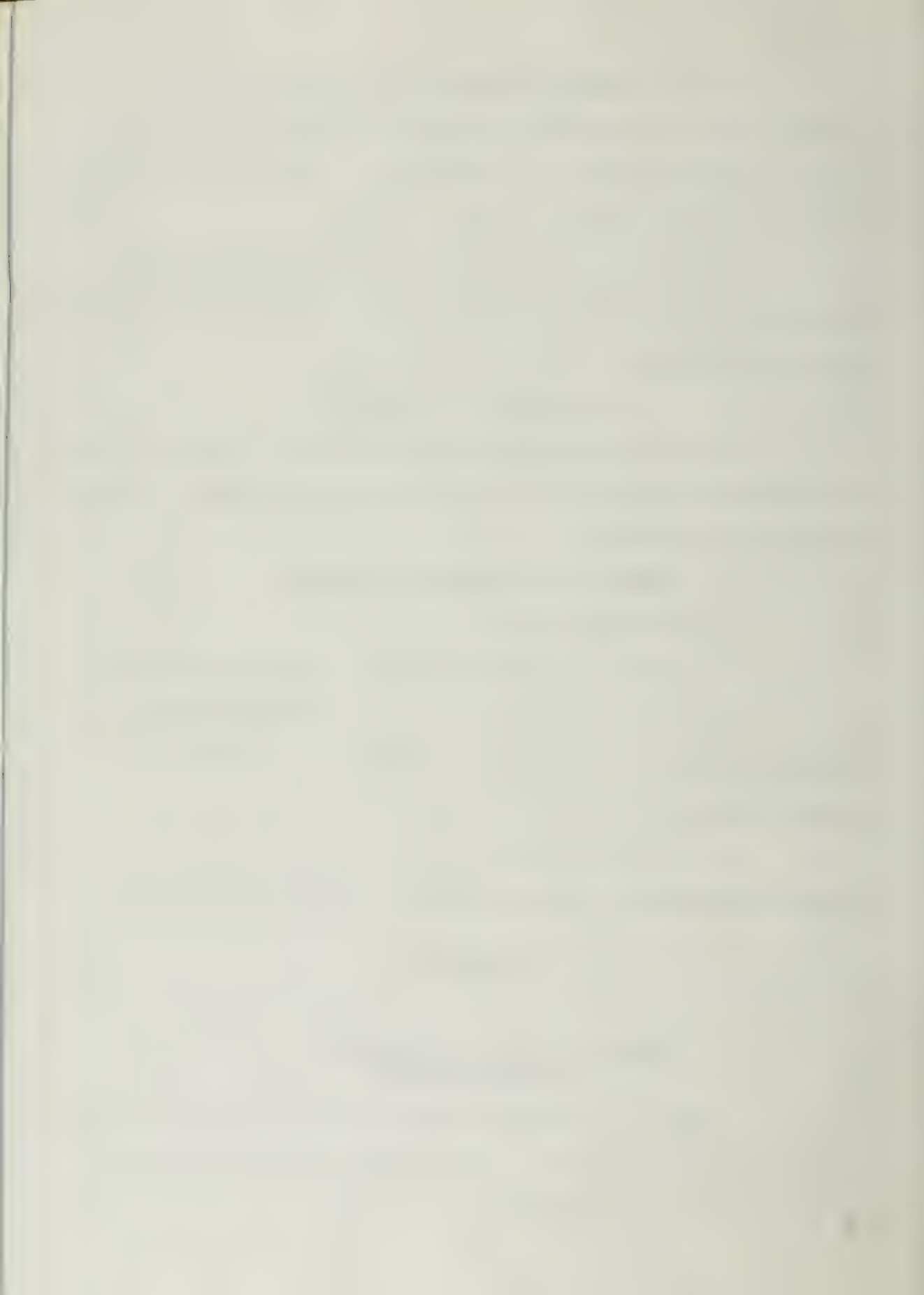
1. That state remedies have not been exhausted;
2. That appellant was not in custody when he brought his petition and has not named or served an indispensable party, his custodian; and
3. That the California authorities were not responsible for the delay in bringing appellant to trial.

ARGUMENT

I

THERE HAS BEEN NO EXHAUSTION OF STATE REMEDIES

Appellant contends that he has exhausted his state remedies and we disagree. He relates that he has done the following in this respect:



1. He made a motion at the preliminary hearing.

(Cl. Tr. p. 4.)

2. He moved the Superior Court to dismiss and set aside the information.

3. He filed a petition for a writ of prohibition or mandamus in the District Court of Appeal.

4. He petitioned the Supreme Court for a hearing on the same question.

At the time the petition was filed no appeal had been had. He asked to have state proceedings stayed and prevented. (Cl. Tr. p. 5.) In his appeal brief he tells us he was tried and convicted on June 3, 1966, and sentenced to state prison August 30, 1966. (App. Op. Br. p. 5.) His appeal is apparently pending.

The trial judge stated that state remedies had been exhausted. (Cl. Tr. p. 10.) We do not disagree with the trial court's action disposing of the case on the merits, as it is always proper to rule against a petitioner on the merits even if state remedies have not been exhausted, but we take issue with the statement that there had been exhaustion, and we press the point as an additional reason for affirming the judgment below. The court recited in its opinion that appellant had been tried, convicted, and sentenced. (Cl. Tr. p. 11.) Appellant now tells us that when the opinion below was filed he had not yet been sentenced. (App. Op. Br. p. 5.)

Thus he had the right to appeal and to make a motion

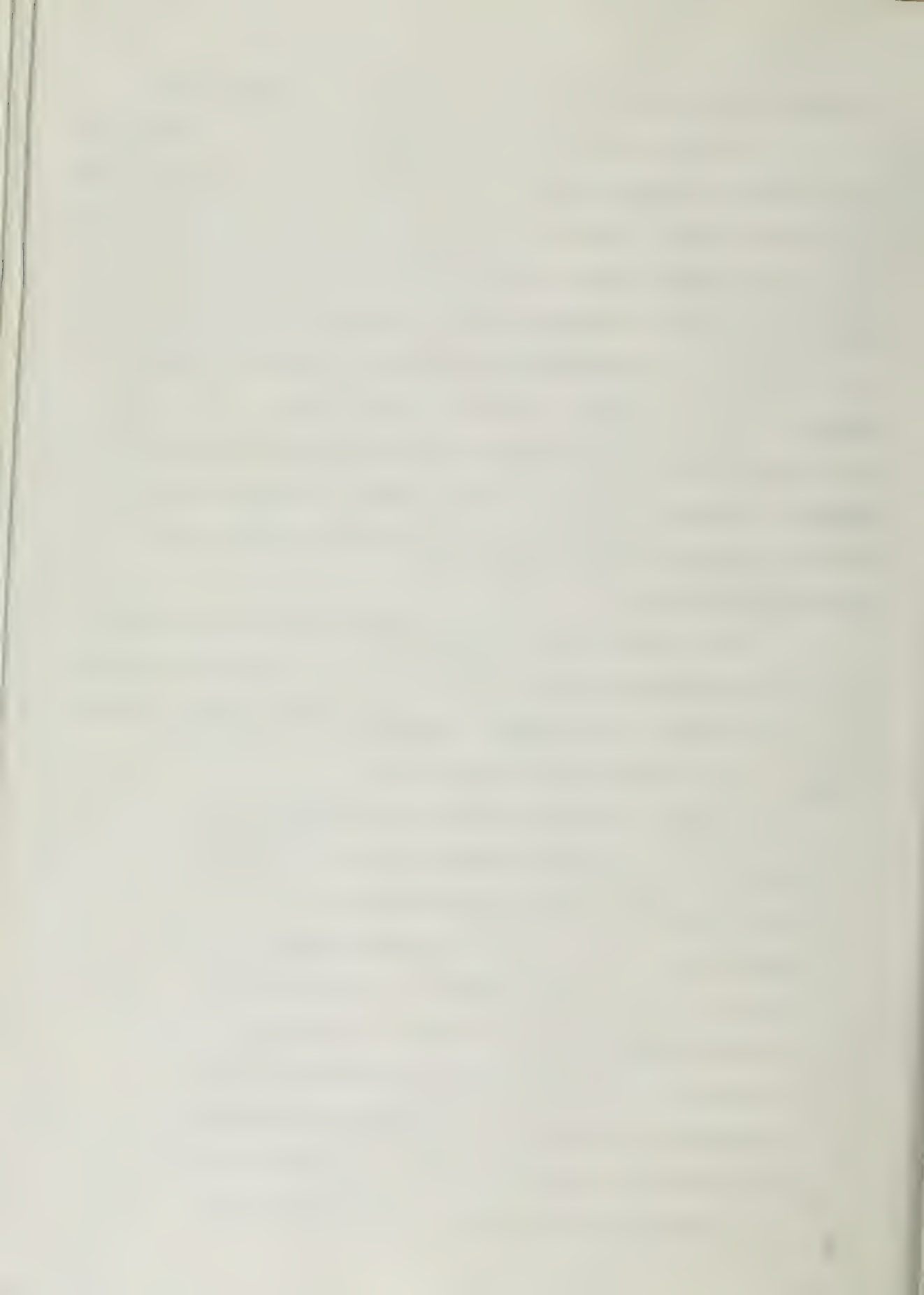


for new trial and he is still exercising the former right.

It is our position that there has been no sufficient presentation of the matter to the District Court of Appeal and the Supreme Court. The writs that were filed do not adequately replace the appeal and are not a substitute for it. There are occasions on which appellate courts have denied pretrial writs but recognized the defendant's position on appeal. People v. Elliot, 54 Cal. 2d 498, 505, 6 Cal. Rptr. 793. The various California remedies available to petitioner are outlined in People v. Wilson, 60 Cal. 2d 139, 148-52, 32 Cal. Rptr. 44, and the continued viability of the remedy by appeal is explained therein.

The denial of an extraordinary writ in California does not ordinarily bar, or detract from the vitality of, the appellate remedy. In People v. Pipes, 179 Cal. App. 2d 5-7, 551-52, 3 Cal. Rptr. 814, it was said:

"The case at bar comes within the general rule that 'denial without opinion of an alternative writ adjudges nothing except that, for reason sufficient to the court, the writ should not be issued; this is true except in rare instances.' [Citing case.] Such a denial 'is not res judicata of the legal issue presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such



denial was intended to be on the merits.'

[Citing case.] There is no indication that the denial in question was intended to be on the merits rather than an exercise of the discretion vested in the court respecting such matters. [Citing case.] There was no intention to foreclose the defendant from resorting to his remedy on appeal."

The ordinary rule is that a federal court should stay its hand on habeas corpus pending completion of the state court proceedings. Ex Parte Royall, 117 U.S. 241, 251, 29 L. Ed. 668, 6 Sup. Ct. 734 (1886). As a general proposition, Federal habeas corpus is not available while a prisoner's appeal from his conviction is pending in the state courts. Shelton v. South Carolina, 285 F.2d 540 (4th Cir. 1961); Louisiana ex rel. White v. Clemmons, 235 F. Supp. 251, 254 (D.C. La. 1964).

This Court has always paid due and careful respect to the principles of comity so essential to the successful operation of our federal system. Rose v. Dickson, 327 F.2d 27, 28-29 (9th Cir. 1964); see too Schiers v. State of California, 333 F.2d 173, 175 (9th Cir. 1964). We ask it to adhere to them once again and to allow to the state courts a full opportunity to deal with state criminal matters. See Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943).

/

/



II

NO INDISPENSABLE PARTY IS NAMED OR SERVED

The petition recites that the appellee is the custodian of petitioner, but it goes on to disprove this fact by stating that petitioner is on bail pending trial. (Cl. Tr. p. 2.) In fact the only connection of the appellee to the case that is clearly alleged is that the appellee had custody of petitioner between the time he was committed before trial on March 31, 1966, until he made bail on May 10, 1966. The petition recites, "Petitioner has been on said bail since May 10, 1966." (Cl. Tr. p. 2.)

It is settled that a person charged with crime who is on bail is not in sufficient custody to bring habeas corpus. Matysek v. United States, 339 F.2d 380, 393-95 (9th Cir. 1964).

In the opening brief on appeal (but not otherwise in the record) it is alleged that petitioner "is now in custody of the California Department of Corrections." Neither that body nor its personnel are, or were, parties to this suit. It is well settled that a prisoner's keeper is an indispensable party in habeas corpus and must be named and served.

Magee v. State of California, 365 F.2d 831 (9th Cir. 1966);

Morehead v. State of California, 339 F.2d 170, 171 (9th Cir. 1964);



Roseborough v. California, 332 F.2d 742 (9th Cir.
1963);

Bohm v. Alaska, 320 F.2d 751 (9th Cir. 1963);

King v. State of California, 356 F.2d 950 (9th Cir.
1966).

The totality of the situation is that appellant sought to bring habeas corpus prior to trial when he was not in custody but on bail against a person who had him in custody at some time in the past and that if he has since then been put into custody he has not sued here the person who detains him. Manifestly, this Court has no jurisdiction under these conditions.

III

PETITIONER WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL

Before petitioner could be prosecuted for the offense under which he is presently detained in California he was arrested, prosecuted, and served sentences for the Arizona and federal authorities. The San Diego District Attorney sought to secure his return from Arizona but when the Arizona authorities declined to send him back no further effort was made to compel appellant's return. Appellant did not notify the San Diego District Attorney when he was transferred to the federal prison system.

We agree with the District Court that the weight of authority is to the effect that the speedy trial provision of

the Sixth Amendment has not been applied directly to the states ^{1/} (Cl. Tr. p. 12) but that the due process clause does protect defendants against certain unreasonable delays that preclude them from preparing a defense. See People v. Wilson, 239 Cal. App. 2d 358, 365, 48 Cal. Rptr. 638.

We agree with the District Court that the majority rule is that a state need not attempt to bring a defendant to trial when he is incarcerated in a federal prison. (Cl. Tr. p. 6.) The District Court endorsed the minority rule to the effect that a state is required to use diligence to obtain a federal prisoner, but we find it sufficient merely to agree with the District Court that even under the minority rule adequate diligence was shown here to avoid transgressing the due process clause. The San Diego District Attorney did make one attempt to secure appellant's return and apparently did not know appellant was transferred to a federal prison. (Cl. Tr. p. 17.) Appellant did not notify the District Attorney of his transfer. Appellant was promptly arrested, tried, and convicted when the State had its first knowledge he was not incarcerated in Arizona.

California has taken a leading role in effectuating concurrent sentences and solving problems relating to prisoners with service due to two sovereigns. In re Stulken, 49 Cal. 2d

1. We do not regard Hong v. New Jersey, 356 U.S. 264, 272 (1957) as undermining this authority or as leaving the question open.



75, 315 P.2d 12; In re Satterfield, 64 A.C. 438. California has also reacted with vigor in insisting that District Attorneys exercise due diligence to secure federal prisoners for pending charges. Barker v. Municipal Court, 64 A.C. 572. However, it remains true that there are difficult problems in this area of reconciling the interests of various sovereigns and that it was appellant originally who created the difficulties by reason of the fact that he offended three sovereigns. In view of all the circumstances, it is respectfully submitted that sufficient diligence has been shown.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment below be affirmed.

Respectfully submitted,

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JOSEPH C. O'CONNOR, Sheriff

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12-28-66
24 CR LA
66-868



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ JACK K. WEBER
JACK K. WEBER
Deputy Attorney General



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE RICHARD CHURCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

APR 13 1967

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APR 21 1967

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NO. 21352
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE RICHARD CHURCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in three counts of a four-count indictment, following trial by jury upon two counts and trial without a jury upon one count.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 1407, 3231, and 3238, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment.

Count One alleged that Louise Harriet Horne knowingly imported and brought approximately 1-1/2 ounces of heroin, a narcotic drug, into the United States from Mexico, and that appellant and defendants Clarence Edward Church and Robert J. Ray knowingly aided, abetted, counseled, induced, and procured¹ the commission of that offense [C.T. 2] .

Count Two alleged that Louise Horne knowingly concealed, and facilitated the transportation and concealment of, approximately 1-1/2 ounces of heroin, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law, and that appellant and defendants Clarence Church and Ray knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 3] .

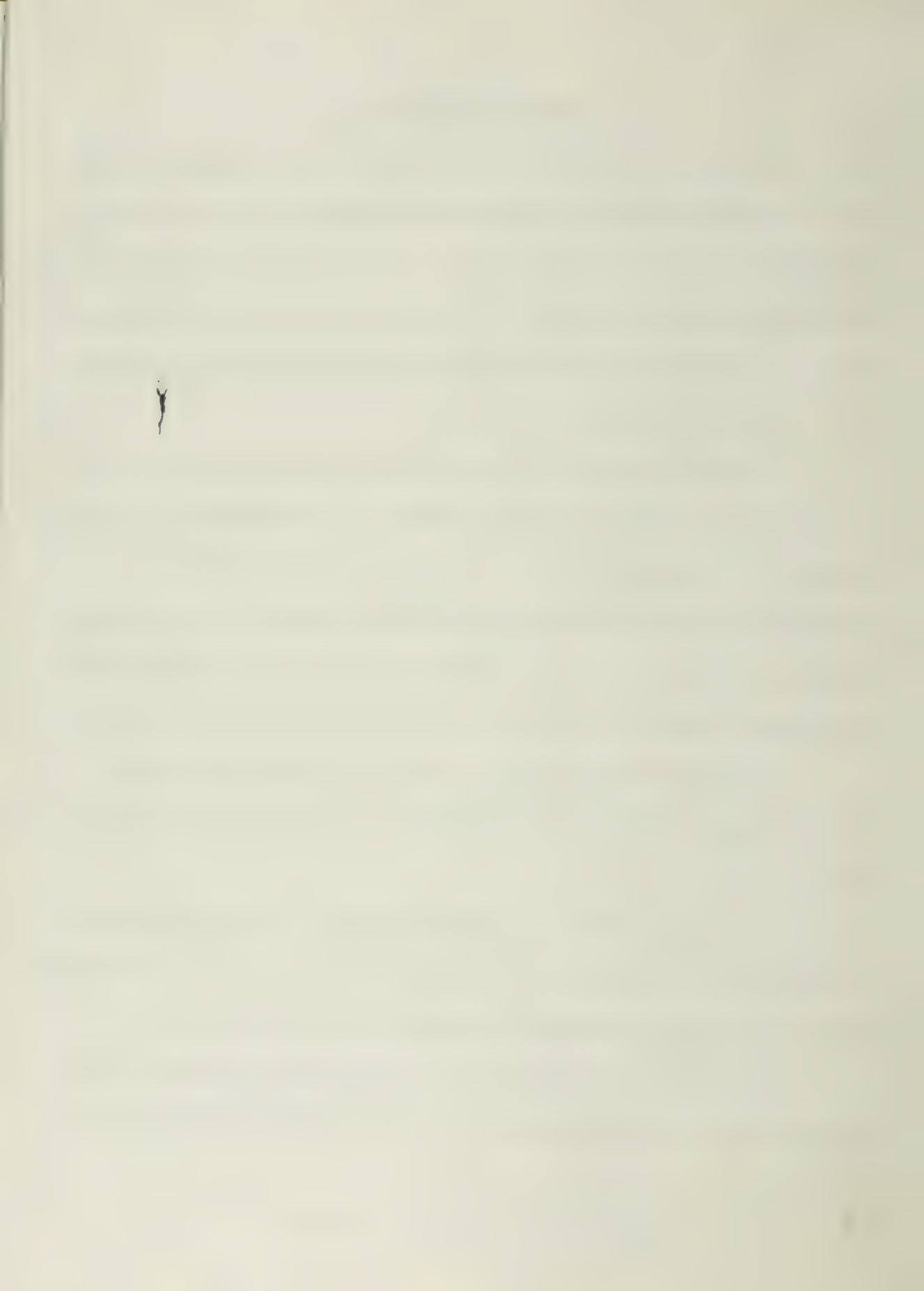
Appellant was not charged in Count Three, which alleged that Clarence Church entered the United States without registering under 18 U.S.C. 1407 [C.T. 4] .

Count Four alleged that appellant entered the United States without registering under 18 U.S.C.A. 1407, being a citizen of the United States who had previously been convicted of possession of marihuana [C.T. 4] .

Appellant was convicted in a trial which ended on August 12, 1965. On September 7, 1965, appellant was found to be insane and to have been

1

"C.T." refers to Clerk's Transcript of Record.



insane and unable to assist in his defense at the time of trial, his conviction was set aside, and he was committed to Springfield. Appellant was later² determined to be sane and was returned for trial [R.T. 8, 36, 159-60]. Appellant was at Springfield for less than five months [R.T. 344-45].

Appellant waived the right of trial by jury upon Count Four [C.T. 6].

His court trial upon this count occurred simultaneously with his second jury trial [R. T. 29-30]. The second jury trial (and court trial) of appellant commenced on May 26, 1966, before United States District Judge James M. Carter [R. T. 2]. Appellant was found guilty as charged upon Counts One and Two on June 3, 1966. He was also found guilty by the Court upon Count Four [C. T. 7-8].

Thereafter, on July 5, 1966, appellant was sentenced to prison for five years upon Count One, five years upon Count Two, and two years upon Count Four, the sentences upon Counts Two and Four to run concurrently to the sentence upon Count One [C.T. 8].

Appellant subsequently filed a timely notice of appeal [C.T. 14].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in following the Ninth Circuit's law of insanity in the instructions to the jury.



2. Alleged error in denying motions relating to sufficiency of the evidence.
3. Alleged error in the Court's questioning of a witness.
4. Alleged error in the Court's comment to the effect that appellant had a right to testify.
5. Alleged error in failing to call Dr. Robuck as a witness.

IV

STATEMENT OF THE FACTS

On March 22, 1965, Miss Louise Harriet Horne had a conversation in Los Angeles, California, with appellant and Clarence Church. Appellant and Clarence Church said that they had to get some "stuff." "Stuff" was the term which they used for "heroin." Clarence Church asked Miss Horne to go to Mexico and said that she would be paid for driving [R.T. 52, 58-59].

Miss Horne left Los Angeles on that date and rode to Tijuana, Mexico, in Clarence Church's 1964 Cadillac automobile. Appellant, Clarence Church, and Robert Ray also participated in the trip [R.T. 52-53, 152-53]. Clarence Church and appellant are brothers. Ray was a brother-in-law of both [R.T. 53-54, 69].

Miss Horne was 19 years of age and had never used heroin. Appellant was 27, Ray was 28, and Clarence Church was 32 [R.T. 53, 77, 305]. Miss Horne drove the vehicle until they approached the international border. Appellant drove the vehicle across the border and they went to the jai alai place, where appellant left the vehicle and returned with heroin. Then Clarence Church and appellant went to a drugstore, where a syringe was

purchased. Since there was no needle available for purchase, they went to another drugstore, where some needles were purchased [R.T. 34-36, 103-04].

They subsequently went to a motel and the three men went inside and left Miss Horne in the car. When they returned, appellant handed an item to Miss Horne and told her to keep it [R.T. 35, 61-62]. Appellant and Clarence Church had a discussion concerning the quality of the heroin, and appellant agreed to take it back [R.T. 56-57].

They returned to the jai alai location, where appellant left the vehicle with the packages. The other three remained in the vehicle. After a long wait, appellant returned with a package. It was stipulated that the package, which consisted of a rubber contraceptive and contents, contained 42.3% heroin [R.T. 50-51, 62-63].

Appellant and Clarence Church had an argument. Appellant did not want Clarence Church to know that half of the material was his. Appellant gave the contraceptive to Miss Horne and told her that she knew where to put it. Clarence Church gave her a syringe. She went to the ladies' room in a service station and placed the contraceptive in her body cavity [R.T. 63-64].

She knew where to put it because she had conferred with one Lorraine, a sister of Clarence Church and appellant, and also because Clarence Church had advised her regarding the matter. Miss Horne had also participated in a previous trip to Tijuana involving appellant, Clarence Church, Lorraine, and two other girls [R. T. 69, 92, 111].

After Miss Horne placed the contraceptive in her body cavity, all four of them crossed into the United States by automobile with Clarence

Church driving. Appellant and Clarence Church had an argument over financial matters during the trip. They entered the United States at San Ysidro, California. Miss Horne had the package. No narcotics were declared to the Customs inspector [R.T. 65, 97, 145-46] .

The Customs inspector had received information that some occupants of the vehicle had entered a drugstore and that it was believed that they had purchased pills or illicit medicine. The vehicle was referred to the secondary inspection area. The heroin package was obtained from Miss Horne by a physician [R.T. 148-49, 164] .

United States Customs Agent Arnie W. Lonman questioned appellant, Eugene Richard Church, who stated that his name was "James Harris," that he had never used any other name, that he had known Clarence Church for approximately five years, and that he had never been arrested upon any charge. He also said that he had never had anything to do with narcotics [R.T. 115-17] .

Appellant had been arrested two months earlier in the Los Angeles area. This incident occurred on January 22, 1965, after appellant entered a 1965 Cadillac with no license plates, drove for awhile, and was contacted by Los Angeles narcotics officers, who attempted to serve a search warrant for search of his person. This attempt resulted in a high-speed pursuit for approximately 2-1/2 miles at approximately 70 or 80 miles per hour. Appellant drove "through" four or five red lights during the chase. After appellant was stopped, a package containing a powdery substance was found upon the floor of the vehicle that he had been driving, on the driver's side [R.T. 166-68,

172, 177] . An expert witness testified that the package contained 22.3 grams of heroin. There was testimony concerning the "chain of possession" of the exhibit [R.T. 173-74, 183-85, 188-91] .

Dr. Allan R. Schrift, formerly the Division psychiatrist for the First Marine Division, testified that in his opinion appellant was probably legally sane in March 1965, and legally insane on August 24, 1965, the date of the examination. The offense occurred on March 23, 1965 [R.T. 141, 392, 394-96] .

Dr. Schrift also testified that appellant and his wife both stated that appellant had a nervous breakdown in 1962, which "cleared gradually." They also told him that "there was no evidence of any problem about the time of the alleged crime," that appellant fell and injured his head in June, 1965, and that since that time, he had gone steadily downhill.

Appellant told Dr. Schrift that he had used heroin and marijuana in the past and might have been using one of these drugs at the time of the alleged crime [R.T. 395-96] .

Dr. William D. Kinnon, a psychologist, was called as a defense witness. He testified that he examined appellant about three weeks before he testified (i.e., about three weeks before June 1, 1966), that appellant had a type of mental disorder known as schizophrenia, and that there was not enough evidence for him to determine appellant's condition on a date in the past [R.T. 246-47, 251, 258, 266]. Dr. Kinnon also testified that legal insanity is a legal term rather than a medical term; that a schizophrenic may be in a state of remission or in a psychotic state; and that when he is in a

state of remission he is apparently sane [R.T. 264, 266] .

Appellant also called Dr. George W. Hollinger, a psychiatrist, as a witness. Dr. Hollinger concluded that appellant "was most probably insane" at the time of the offense [R.T. 339, 367] . However, he did not observe appellant until April 26, 1966. The alleged offense occurred on March 22, 1965 [R. T. 145, 343] . Dr. Hollinger admitted that he would not know appellant's condition on March 22, 1965, unless he relied upon statements made by appellant and appellant's wife:

"Obviously unless I had been there, I would not know." [R.T. 374] .

Dr. Hollinger also testified that insanity is a legal term. He testified that appellant told him that he had used marihuana and various pills, such as "goofballs" and Dexedrine, and that Mrs. Church stated that appellant had taken "all kinds of pills" and had used heroin prior to the arrest. He also testified that many kinds of medications might cause persons to stare into space [R.T. 363, 367-69] .

Mr. George Sprow testified that he lived next door to appellant and had observed appellant staring into space at a barbecue in mid-March 1965. He also testified that appellant spent most of his time in pajamas [R.T. 308-10] .

Clarence Church testified concerning appellant's mental problems approximately in 1961, as well as some events in 1964 and 1965, including telephone calls by appellant at unusual hours and staring into space [R.T. 234-244] . He also testified that appellant had been a professional rock and roll singer who had a "hit," "Close to a million seller." [R.T. 230-31] .

Clarence Church also testified that he had made previous trips to Mexico with Miss Horne to obtain heroin and that Miss Horne knew how much heroin that she could carry in her cavities [R.T. 300-01]. He testified that he himself paid the money for the heroin to a man living in Mexico. Probation Officer Victor W. Sharp testified that Clarence Church had told him that he, Clarence, gave his brother (appellant) \$350 to buy the heroin, and that his brother later returned to the narcotic peddler because the quality of the heroin was inferior. Clarence Church testified that he did not make these statements [R.T. 143-44, 155-56].

Appellant's wife testified that appellant had a mental problem in 1961. She also testified concerning a possible suicide attempt, suicide threats, before or after the date of the offense, long discussions, late hours, staring, and other matters [R.T. 316, 320-33]. She also testified concerning the reason for appellant's use of the "James Harris" name [R.T. 318].

Agent Lohman testified that on the date in question, appellant was very lucid and appeared to be normal in every way. There was no objection to this testimony [R.T. 116, 118]. Agent Lohman later testified over objection that persons under the influence of marijuana are very unresponsive and that "They stare off into space and you don't seem to get through to them They seem to be off in another world." He also testified that certain pills cause similar reactions [R.T. 386-87].

When the Court asked Government counsel whether he would stipulate that Dr. Robuck's report go into evidence, Government counsel agreed to do so "if the jury is informed that he is a defense witness." Counsel

for appellant refused to stipulate and requested that the Court call Dr. Robuck as the Court's witness [R.T. 206-07, 209] .

In connection with the trial upon the charge of failing to register, it was stipulated that appellant was a citizen of the United States who entered the United States from Mexico without registering, having been previously convicted of possession of marijuana under Section 11500 of the California Health and Safety Code [R.T. 214-15] .

V

ARGUMENT

A. INSTRUCTIONS BASED UPON THE NINTH CIRCUIT LAW
OF INSANITY DID NOT CONSTITUTE ERROR.

The trial Court's instructions to the jury upon the question of insanity were based upon the M'Naghten rule [R.T. 483] .

These instructions were proper.

Sauer v. United States, 241 F.2d 640 (9th Cir. 1957), cert. denied, 354 U. S. 940 (1957);

Smith v. United States, 342 F.2d 725 (9th Cir. 1965).

Appellant contends that the law of insanity should be changed. This Court has already answered that contention: "If change there is to be, it must come from a higher judicial authority, or from the Congress."

Sauer, supra, at p. 652.

Appellant cites a number of cases, including United States v. Currens, 290 F.2d 751 (3rd Cir. 1961), and Wien v. United States, 325 F.2d 470 (10th Cir. 1963). Wien rejects the criminal insanity test employed in Currens (at

p. 427).

Appellant also suggests that the Model Penal Code test of insanity be substituted for the M'Naghten rule. Appellant favors the following test:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

(Appellant's Opening Brief, pp. 1-2) .

The terms, "disease" and "defect," play a critical role in the proposed test. This Court has discussed these vague terms with evident lack of approval.

Sauer, supra, at p. 646.

Unless the terms in the Model Penal Code test are carefully and narrowly interpreted, the results would be phenomenal, to say the least. A typical marijuana smuggler could argue that as a result of mental defect (i.e., hostility to society, resulting from hatred of his father), he is "unable to conform his conduct to the requirements of law." The criminal whose urge to inflict pain causes him to assault and maim helpless victims also could probably find psychiatric support for the proposition that he is "unable" to conform his conduct to the requirements of law. The narcotics addict-peddler could also find the Model Penal Code test quite helpful. While neurosis, which presumably is a mental defect, probably plays a major role in most serious crimes, the Model Penal Code does not provide a satisfactory guide

for the disposition of cases involving the ordinary neurotic criminal.

The American Law Institute apparently attempted to meet this obvious problem by suggesting that "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. Currens, supra, p. 774, n. 32. This apparently allows the typical neurotic offender one or more "free" crimes, an immunity that lasts until the neurosis leads to "repeated criminal or otherwise anti-social conduct." The objections to such a rule are self-evident.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant contends that the Government did not prove beyond a reasonable doubt that appellant was sane at the time of the offense.

In considering this question, it is helpful to analyze the slight and unconvincing evidence offered by appellant in the effort to indicate that he was insane. Dr. William Kinnon, a psychologist, testified that there was not enough evidence for him to determine the issue of sanity at the time of the offense [R.T. 246-47, 266]. The basis for this conclusion is evident from Dr. Kinnon's testimony. At any given time, appellant could be in a state of psychosis or in a state of remission (i.e., normalcy or sanity), [R.T. 258-59, 266]. Since Dr. Kinnon examined appellant about three weeks before he testified (i.e., about three weeks before June 1, 1966) [R.T. 251] he did not examine appellant until more than a year after the date in question (March 22, 1965). He clearly had no means of determining whether appellant

was psychotic or in a state of remission (sanity) on the date of the offense.

Dr. George W. Hollinger, a psychiatrist, was the only other expert witness called by appellant. He concluded that appellant "was most probably insane" at the time of the offense [R.T. 339, 367]. However, he did not observe appellant until April 26, 1966 [R.T. 343], more than 13 months after the date of the offense. With considerable reluctance, Dr. Hollinger finally admitted the obvious fact that he would not know whether appellant was in a state of remission (i.e., sanity) on the date of the offense unless he relied upon the statements of appellant and appellant's wife [R.T. 374].

Consequently, his opinion would have been of no value if appellant and his wife were not telling the truth. There is every indication that they were not telling the truth. Appellant and his wife both told Dr. Allan R. Schrift that appellant recovered from a nervous breakdown that occurred in 1962, that "there was no evidence of any problem about the time of the alleged crime," and that appellant fell and hit his head in June 1965 (after the crime) and went steadily downhill after the injury [R.T. 395-96].

It was evident that Dr. Hollinger's opinion was based upon a belief that appellant was truthful when he apparently told Dr. Hollinger that he did what he did on March 22, 1965, thinking "that was the way to salvation for brother and ultimately for him." [R.T. 360]. In Carpenter v. United States, 264 F.2d 565 (4th Cir. 1959), the experts' conclusion of temporary insanity "was clearly founded upon their assumption of the truth of Carpenter's description of his emotions and the events after he had left the tavern." (at p. 570).

The Court of Appeals stated:

"If the facts were not what the doctors supposed, their opinions were baseless and of no evidentiary value." (at p.370).

In Kaufman v. United States, 350 F.2d 406 (8th Cir. 1965), a similar situation existed in regard to statements made to a psychiatrist by one Patricia Scott, a friend of the defendant. The Court of Appeals stated:

"If the jury felt, as it could, that Scott's testimony was not true, the very foundation for Dr. Waitzel's opinion disintegrates." (at p. 412).

Appellant presented the testimony of three lay witnesses, including his brother and his wife. His brother testified concerning appellant's mental problems approximately in 1961 and also some events in 1964 and early 1965, the latter primarily involving telephone calls by appellant at unusual hours and staring into space [R.T. 234-44]. The brother's testimony concerning the events of March 22, 1965, was completely inconsistent with his previous statement to Probation Officer Victor W. Sharp [R.T. 143-44, 155-56].

Appellant's wife testified that appellant had a mental problem in 1961, and also testified concerning a possible suicide attempt, suicide threats before or after the date of the offense, long discussions, late hours, staring, and other matters [R.T. 316, 320-33]. Her testimony was completely inconsistent with her previous statements to Dr. Schrift [R.T. 333-34, 395-96].

Appellant's other lay witness was a neighbor, George Sprow, who testified that he saw appellant staring into space at a barbecue in mid-March 1965. He also testified that appellant spent most of his time in pajamas [R.T.

Agent Lohman testified that staring into space was a symptom of being under the influence of marijuana: "They seem to be off in another world." [R.T. 386-87] .

Appellant minimizes Agent Lohman's testimony because he was a lay witness. However, testimony by laymen regarding the issue of sanity has been accepted by the courts, even where the witness apparently observed the subject for only a brief period of time. In Evatt v. United States, 359 F.2d 534, 547 (9th Cir. 1966), this Court upheld the use of lay testimony concerning sanity where the three testifying officers had had considerable contact with insane persons. Agent Lohman had had experience with insane suspects [R.T. 133] . Appellant's counsel suggested that laymen such as Agent Lohman have experience in observing "people in various conditions" and asked for his impressions in regard to the matter [R.T. 132-33] .

Considering the fact that there was expert psychiatric testimony to the effect that appellant was sane at the time of the offense, and that the testimony of the only expert witness claiming that appellant was insane rested upon the quicksand foundation of the self-serving statements by appellant and his wife, which statements were completely discredited by their contradictory statements to Dr. Schrif, it is respectfully submitted that the evidence of sanity was sufficient, viewed in the light of the well-established rule that the evidence upon appeal is considered in the view most favorable to the prevailing party in the trial court.

C. THE COURT'S QUESTIONING OF A WITNESS DID NOT
CONSTITUTE ERROR.

Appellant contends that the trial Court committed prejudicial error because a question asked of a witness allegedly would cause the jurors to believe that an acquittal would result in appellant's release from custody.

Disregarding the remarkable proposition that telling the jury the truth concerning their verdict (i.e., that acquittal would mean freedom) could constitute error, it is respectfully submitted that the question did not prejudice appellant. The question was as follows:

"THE COURT: Is a schizophrenic who has the high manic reaction the more dangerous person than one who does not have the manic showing?" [R.T. 348-49] .

The question was not answered, as the objection was sustained [R.T. 349] . However, it would appear that the question was highly material, in view of the evidence regarding the wild high-speed chase of appellant in the Los Angeles area.

At any rate, the jurors were instructed that "Any evidence to which an objection has been sustained shall be disregarded" [R.T. 470].

There was no motion for a mistrial [R. T. 349] .

D. THE COURT'S COMMENTS CONCERNING THE RIGHT OF
APPELLANT TO TESTIFY DID NOT CONSTITUTE ERROR.

During the trial appellant attempted to produce his defense by hearsay testimony without subjecting himself to cross-examination. The trial Judge

sustained an objection to this improper procedure and noted that appellant had the right to testify but could not testify through third persons [R.T. 353] .

Appellant contends that this remark constituted error. It is respectfully submitted that the jurors were told no more than they already knew. In many cases, a trial in which a criminal defendant is prohibited from testifying would be a farce, not a trial. It should not be lightly assumed that jurors are entirely lacking in common sense.

Furthermore, the trial Judge had every reason to believe that appellant would testify later during the trial. Appellant's counsel had implied during cross-examination of Miss Horne that certain facts had occurred:

"Q Wasn't it the plan between you and Clarence for you to take this heroin, go across the border on foot and meet him either after, in the Grant Hotel or back in Mexico after you transported it?"

"A No, this is not true." [R.T. 109] .

Since appellant's other witnesses did not testify concerning this alleged scheme, the Court could assume that appellant intended to testify.

Appellant's counsel apparently did not consider the Court's remark to be very serious, because there was no objection until the following day. Even then, there was no motion for mistrial [R.T. 353-54, 390] .

The jurors were instructed that "no presumption of guilt may be raised and no inferences of any kind may be drawn from the failure of a defendant to testify." [R.T. 476] . Appellant's counsel had requested an instruction in regard to the matter:

"I would prefer that the matter not be developed any further in front of the jury except by the instruction at the time the Court instructs." [R.T. 391] .

E. THE COURT'S FAILURE TO CALL DR. ROBUEK AS A WITNESS DID NOT CONSTITUTE ERROR.

Appellant contends that the Court committed error by failing to call Dr. Robuck as the Court's own witness.

Appellant attempted to have Dr. Robuck's hearsay report entered into evidence. The Court asked Government counsel whether he would stipulate that the report could go in, and Government counsel replied that he would stipulate "if the jury is informed that he is a defense witness." Appellant's counsel objected to this. He later stated, "Your Honor, by no stretch of the imagination is this a defense witness." [R.T. 206-07] .

The Court informed appellant that he (appellant) could call Dr. Robuck as a witness if he wished to do so [R.T. 208] . Appellant did not choose to do so.

It is evident that appellant's chief interest was in providing the jurors with the belief that the Court favored the testimony of Dr. Robuck over that of other expert witnesses in the case. When this attempt to provide an impression that the Court favored one side of the case was unsuccessful, appellant did not have sufficient confidence in Dr. Robuck's support for his position to call Dr. Robuck as a witness, even though the Court offered to tell the jurors how Dr. Robuck was appointed (i.e., by the Court's own

decision) [R.T. 207-08] .

It is respectfully submitted that the trial judge was not required to indicate that he preferred the testimony of Dr. Roback to the testimony of the expert witness called by one of the adversaries in the case.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

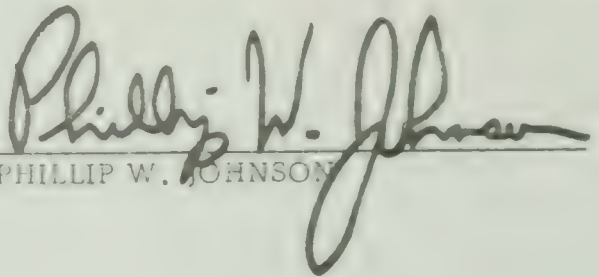
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


PHILLIP W. JOHNSON



